Supreme Court, U.S.
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In The

Supreme Court of the United States

R.M.S. TITANIC, INCORPORATED,
Successor in interest to Titanic Ventures,
limited partnership,

Petitioner,

v.

THE WRECKED AND
ABANDONED VESSEL, *ET AL.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Petition for Writ of Certiorari

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QUESTIONS PRESENTED

I. Can ownership rights granted by a district court in an *in rem* proceeding, relied upon in public commerce for eight years, and affirmed by a court of appeals, subsequently be voided by the same court of appeals?

II. In an *in rem* proceeding, can a court of appeals find it inappropriate for an admiralty court to enter an order pursuant to both the law of finds and the law of salvage?

III. In an *in rem* admiralty proceeding, what uniform standard of abandonment should be established?

PARTIES TO THE PROCEEDING

All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Petitioner:
R.M.S. Titanic, Inc., was the Plaintiff Appellant before the United States Court of Appeals.

Respondents:
Robert C. Blumberg, Ole Varmer, Madeleine K. Albright, William M. Daley and D. James Baker were all aligned as defendants below, but none of them participated in the 2001 District Court proceedings or the 2002 Appellate Court proceedings that led to this Petition for Writ of Certiorari. Liverpool and London Steamship Protection and Indemnity Association, Limited, was aligned as a claimant in the proceedings below, but its claim was dismissed with prejudice by an agreed dismissal order entered in the District Court on June 7, 1994. Deep Ocean Expeditions, Wildwings Worldwide Travel, Quark Expeditions, Incorporated, Mike McDowell, Ralph White, Don Walsh, Ph.D., Alfred S. McLaren, Ph.D., Christopher S. Haver, R/V Akademik Mstislav Keldysh, United States of America and Blackhawk Television were all aligned as parties-in-interest below, but none of them participated in the 2001 District Court proceedings or the 2002 Appellate Court proceedings that led to this Petition for Writ of Certiorari. John A. Joslyn was aligned as a movant in the District Court proceedings in 1996, but he did not participate in the 2001 District Court proceedings or

the 2002 Appellate Court proceedings that led to this Petition for Writ of Certiorari. The University of Virginia Appellate Litigation Clinic and David Shuttle were aligned as amici curiae below and participated in the 2002 Appellate Court proceedings as such.

CORPORATE DISCLOSURE STATEMENT

R.M.S. Titanic, Inc. is a Florida corporation with no parent companies and does not have a public held company that owns 10% or more of its stock.

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PETITION FOR WRIT OF CERTIORARI

R.M.S. Titanic, Inc., respectfully requests that a Writ of Certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit ("Court of Appeals" or "Appellate Court") giving rise to this action is published at R.M.S. Titanic, Inc. v. The Wrecked and Abandoned Vessel . . ., 286 F.3d 194 (4th Cir. 2002), and is reprinted in the Appendix ("A") at A 1 through A 34. The Order of the District Court, dated September 26, 2001, and the Amended Order of the District Court, dated October 19, 2001, which gave rise to the appeal to the United States Court of Appeals for the Fourth Circuit, appear at A 41 through A 42 and A 35 through A 40, respectively. The earlier opinion of the United States Court of Appeals for the Fourth Circuit, which is also relevant to this action, appears at A 43 through A 94 and is reported at 171 F.3d 943 (4th Cir. 1999). The June 7, 1994 Orders of the District Court, which are also relevant to this action, appear at A 95 through A 96 and A 97 through A 98.

JURISDICTION

The Opinion of the United States Court of Appeals for the Fourth Circuit was issued on April 12, 2002. No petition for rehearing was filed in this case. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED IN THE CASE

No statutes or rules are involved in this case.

STATEMENT OF THE CASE

In 1987, R.M.S. Titanic, Inc. ("RMST"), through its predecessor-in-interest, Titanic Ventures Limited Partnership ("TVLP"), conducted the first salvage at the wreck site of the RMS TITANIC, approximately 2 ½ miles beneath the surface of the North Atlantic Ocean. A 4. In 1992, RMST, through its predecessor-in-interest, TVLP, appeared before the U.S. District Court for the Eastern District of Virginia to assert salvage and ownership rights to the RMS TITANIC and its cargo. After having heard substantial evidence over several days, the District Court authored and entered an Order on October 13, 1992 pursuant to the law of salvage and the law of finds, which provided that:

> the intervening plaintiff Titanic Ventures is the **true, sole and exclusive owner of any items salvaged from the wreck** of the defendant vessel and is entitled to all salvage rights; and it is further
>
> ORDERED that . . . the U.S. Marshall is directed to deliver the artifacts in his custody, per previous court order in this matter, to counsel for Titanic Ventures.

Marex Titanic, Inc. and Titanic Ventures v. The Wrecked and Abandoned Vessel . . .Civil Action No. 2:92cv618 (U.S. Dist. Ct., E.D.Va., Norf. Div.)(October 13, 1992)(emphasis added). The 1992 Opinion and Order of the District Court was subsequently reversed by the Court of Appeals on the grounds that the District Court improperly vacated a voluntary dismissal filed by the

plaintiff during the District Court proceedings. *Marex Titanic, Inc. v. The Wrecked and Abandoned Vessel*, 2 F.3d 544 (4th Cir. 1993).

With the dismissal of the 1992 case, RMST commenced an *in rem* action against the RMS TITANIC seeking a salvage and/or finds award. Pursuant to Supplemental Federal Rule of Civil Procedure C(4). The District Court assumed subject matter jurisdiction under 28 U.S.C. § 1333. Notice was then published indicating that the District Court would entertain claims against the wreck and her cargo. A 49. Liverpool & London Steamship Protection and Indemnity Association, Ltd. ("Liverpool & London") filed the sole claim, which was allegedly based upon subrogation rights it had obtained from the payment of certain passenger claims for personal effects and cargo. A 49. However, on June 7, 1994, the District Court entered an Order, based upon representations by Liverpool & London, the sole claimant, and RMST that all matters and controversies between them had been compromised and settled, dismissing the claim of Liverpool & London with prejudice. A 49, 95.

After entry of that Order, the District Court entered another Order on June 7, 1994. This second June 7, 1994 Order contained the same operative language regarding salvage and ownership as was contained in the 1992 Order authored by the District Court, and stated, in pertinent part, as follows:

> the court FINDS AND ORDERS that R.M.S. Titanic, Inc. is the salvor-in-possession of the wreck and wreck site of the R.M.S. Titanic, . . . and that R.M.S. Titanic, Inc. is **the true, sole and exclusive owner of any items salvaged from the wreck** of the defendant vessel in the past and, so long as R.M.S. Titanic, Inc. remains salvor in possession, items salvaged in the future. . .

R.M.S. Titanic, Inc. v. The Wrecked and Abandoned Vessel . . . Civil Action No. 2:93cv902 (U.S. Dist. Ct., E.D.Va., Norf. Div.)(June 7, 1994)(emphasis added). A 49-50, 5, 97. That Order was never appealed.

In the ensuing years, RMST and the District Court proceeded with the clear understanding that RMST owned the objects recovered from the TITANIC, as evidenced by UCC filings and the fact that RMST encumbered the objects. RMST also entered into licensing agreements and contracts for the exhibition of the objects and sold coal recovered from the wreck site of the TITANIC, all with the knowledge and approval of the District Court where the admiralty action was pending. At the same time, RMST advised the District Court that its business plan was to exhibit the objects for remuneration, rather than sell them. A 16, 32.

In 1998, the District Court ruled, among other things, that RMST was entitled to exclude third parties from visiting and photographing the wreck site while it continued as salvor-in-possession. A 46-7. In 1999, the Court of Appeals reversed the District Court ruling regarding visitation and photography, while affirming the District Court's exercise of jurisdiction. A 94. In so

doing, and in addressing other issues, the Court of Appeals reviewed the status and content of the case, noting that:

> in 1994, the District Court in the Eastern District of Virginia, exercising constructive in rem jurisdiction over the wreck and wreck site of the Titanic, awarded exclusive salvage rights **as well as ownership of recovered artifacts**, to R.M.S. Titanic, Inc. ("RMST"), a Florida corporation.

R.M.S. Titanic, Inc. v. Haver, et al, 171 F.3d 943, 951 (4th Cir. 1999)(emphasis added). A 46. The 1999 Opinion went on to review the procedural history in detail, to note that the only claim that was filed in the District Court action was dismissed on June 7, 1994, and to recognize that:

> on the same day, the Court entered a separate order granting RMST not only exclusive salvage rights over the wreck and the wreck site of the Titanic, but also **'true, sole and exclusive ownership of any items salvaged from the wreck.'**

Id. at 952 (emphasis added). A 49-50. The Court of Appeals went on in its 1999 Opinion to review in detail the procedure followed by the District Court and then determined that:

> [t]hese conclusions reached by the District Court about RMST's rights are consistent with salvage law which is part of the *jus gentium* and we expect that whether RMST had returned property from the Titanic to an admiralty court in England or France or Canada, the court would, by applying the same principles, have reached the same conclusions.

Id. at 966-67 A 84.

In July 2000, after reviewing newspaper reports and letters the Court received from non-parties indicating that RMST planned to consider sale of the objects recovered from the TITANIC in order to finance continued recovery at the wreck site, the District Court issued an Order, **sua sponte**, directing RMST not to sell the objects it had recovered. A 7. Because the only logical basis upon which the District Court could assert the right to control such disposition was as an incident of the Court's control over RMST's activities as **salvor-in-possession** (rather than based upon any lack of ownership by RMST, since the District Court had held that RMST owned the recovered items), and because RMST had no plans to sell the objects at that time, no action was taken to appeal the Order. However, RMST's business plan changed in 2001 and it began to consider alternatives to exhibition. Pursuant to a prior order of the District Court, RMST filed a Periodic Report on September 17, 2001 discussing such alternatives and appeared before the District Court on September 24, 2001 to present that Periodic Report. Following the September 24, 2001 hearing, the District

Court issued an Order on September 26, 2001, which Order was subsequently amended on October 19, 2001. In said Orders, the District Court continued to enjoin RMST from transferring title to individual objects recovered from the wreck of the TITANIC. A 10-11, 41-42. Moreover, the District Court enjoined RMST from selling, as a group, all of the objects previously recovered from the wreck and all of the objects recovered in the future from the wreck, without prior approval of the Court. A 41-2. RMST, in turn, filed a timely appeal of the Orders.

On April 12, 2002, the Court of Appeals affirmed the Orders of the District Court. *R.M.S. Titanic, Inc. v. The Wrecked and Abandoned Vessel*, 286 F.3d 194 (4th Cir. 2002). A 4. In so ruling, the Court of Appeals, in an implicit reversal, reviewed and declared ambiguous the June 7, 1994 Order of the District Court that had awarded ownership to RMST of all items then salvaged from the wreck of the TITANIC as well as all items to be recovered in the future by RMST so long as RMST remained salvor-in-possession of the TITANIC. A 26. Surprisingly, the two conflicting Court of Appeals Opinions (1999 vs. 2002) were authored by the same jurist.

While RMST noted in its opening brief to the Court of Appeals that it understood the June 7, 1994 Order was entered pursuant to the law of finds and salvage, the validity of the June 7, 1994 Order and its award of title to the artifacts was not challenged by RMST (the sole party to the case) or either of the two *amicus curiae* and, thus, was not an issue raised on appeal. Indeed, for nearly eight years, RMST had relied upon the District Court's June 7, 1994 Order and its award of ownership of the items recovered from the

TITANIC to RMST. In many ways, the District Court's June 7, 1994 Order and the Court of Appeals' subsequent affirmation of that Order on March 25, 1999 have been the pillars upon which RMST has been built and its daily business operations conducted. Relying upon the June 7, 1994 Order of the District Court and its award of ownership, as well as the Court of Appeals' March 25, 1999 affirmation of that Order and award, RMST has publicized its ownership rights and the public has bought shares of company stock based upon findings of ownership made by the District Court and the Court of Appeals. Moreover, on the basis of the District Court and Appellate Court actions, RMST has filed required UCC notices, committed significant resources to fund expeditions to the wreck, encumbered the objects recovered from the wreck and repeatedly entered into agreements to exhibit the objects around the world. Such actions, available only to property owners, have provided the company with the capital necessary to protect shareholder interest, remain in business, and continue to conduct recovery expeditions to the wreck of the TITANIC. However, acting *sua sponte*, the Court of Appeals reviewed the 1994 Order, implicitly reversed and reinterpreted it to convey only possession, not title, and held that RMST had no title to any objects that it had previously recovered from the wreck of the TITANIC nor to any objects that it might recover in the future therefrom. A 26-32.

REASONS FOR GRANTING THE PETITION

I. The Court of Appeals' Decision to Reverse Itself and the District Court's Award of Ownership Undermines Faith in the Judicial System as a Whole, Violates Precedent and Works an Injustice on RMST and Its Public Shareholders

It is well-established that "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Arizona v. California*, 460 U.S. 605, 618 (1983). While courts of appeal technically have the power to reverse the rule of law previously established in a case, they exercise that power "only in the most unusual circumstances." *Maryland Cas. Co. v. City of South Norfolk*, 54 F.2d 1032, 1039 (4th Cir. 1932). Indeed, the decision of an appellate court establishes the rule of law in a case and "must be followed in all subsequent proceedings in the same case" unless a subsequent trial produces substantially different evidence, controlling authority has since made a contrary decision of law applicable to the issue, or the prior decision was clearly erroneous and would work a manifest injustice. *United States v. Aramony*, 166 F.3d 655, 661 (4th Cir. 1999). The Court of Appeals simply ignored its prior 1999 ruling and made no finding in its Opinion that any of these exceptions applied.

As detailed more fully above, in the instant case, the District Court entered an Order on June 7, 1994 that awarded RMST title to the objects that it had previously recovered from the wreck of the TITANIC, title to all of the objects that it recovered therefrom in the future, so long as RMST remained salvor-in-

possession of the wreck, and exclusive salvage rights to the sunken vessel. *R.M.S. Titanic, Inc. v. The Wrecked and Abandoned Vessel* . . . Civil Action No. 2:93cv902 (U.S. Dist. Ct., E.D.Va., Norf. Div.)(June 7, 1994). A 97-8. On March 24, 1999, the Court of Appeals acknowledged and affirmed the District Court's Order and its award of ownership. *R.M.S. Titanic, Inc. v. Haver, et al*, 171 F. 3d at 951-52, 966-67. A 43-97. RMST, for nearly eight years, conducted its daily business operations upon the basis of the District Court's June 7, 1994 Order and the Court of Appeals' March 25, 1999 acknowledgment and affirmation of that Order.

However, in spite of RMST's great reliance on the award of ownership made in this case by the District Court in 1994, which was affirmed by the Court of Appeals in 1999, and remained unchallenged for nearly eight years, the Court of Appeals reversed the award in 2002. Acting *sua sponte* in the course of hearing RMST's current appeal, the Appellate Court reviewed the 1994 Order, implicitly reversed its 1999 Opinion, reinterpreting the 1994 Order to convey only possession, not title, and held that RMST had no title to any objects that it had previously recovered from the wreck of the TITANIC, nor to any objects that it might recover in the future therefrom. A 1-34.

Such a decision is flawed on numerous levels and should not be allowed to stand as the Court of Appeals' decision to reverse the award of ownership in the case is not based on any recognized ground for reversal. No subsequent trial producing substantially different evidence has occurred since the district court entered its June 7, 1994 Order or since the Court of Appeals affirmed that Order in 1999. *United States v. Aramony*, 166 F.3d 655, 661 (4th Cir. 1999). Nor has

controlling authority made a contrary decision of law applicable to the issue of object ownership since the District Court entered its June 7, 1994 Order or since the Court of Appeals affirmed that Order in 1999. *Id.* Nor was it ever determined that the District Court's June 7, 1994 Order or the Appellate Court's 1999 affirmation of that Order were clearly erroneous and worked a manifest injustice on any other party. *Id.* Ironically, the only manifest injustice suffered in this case was suffered by RMST (the sole litigant in this action and a party who relied on the decisions of the District and Appellate Courts), when the Court of Appeals reversed itself and the District Court on the long-standing award of ownership.

The impact of the Court of Appeals' decision to reverse the award of ownership established in the instant case extends far beyond RMST. Indeed, it undermines faith in the judicial system as a whole. In the wake of the Appellate Court's action, how could anyone feel secure about a federal court decision again, be it a litigant or the unsuspecting public buying shares in a publicly-traded company such as RMST. If an unchallenged, heavily relied upon, nearly eight year old award of ownership, that was not even an issue on appeal, can be reversed by the same Appellate Court who had previously affirmed the award, no decision is ever truly safe or final.

II. The Law of Finds Supplements the Law of Salvage

In its April 12, 2002 Opinion, the Court of Appeals declared ambiguous the June 7, 1994 Order of the District Court which had awarded RMST exclusive salvage rights to the wreck of the TITANIC, title to the objects it had previously recovered from the wreck, and title to any objects it might recover in the future so long as the company remained salvor-in-possession. 286 F.3d at 206-07. A 1-34. In the eyes of the Appellate Court, the ambiguity of the Order stems from the fact that it is based upon and incorporates language common to both the law of finds and the law of salvage. *Id.* A 17-26.

However, contrary to the analysis of the Appellate Court, there is nothing ambiguous or, for that matter, inappropriate about an order entered pursuant to both the law of finds and the law of salvage. This is because the law of finds does not operate to the exclusion of the law of salvage. *Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*, 640 F.2d 560, 567-68 (5th Cir. 1981), *on remand* 546 F. Supp. 919 (S.D.Fla. 1981); *Zych v. Unidentified, Wrecked and Abandoned Vessel*, 811 F. Supp. 1300 (N.D.Ill. 1992); *Hatteras, Inc. v. U.S.S. Hatteras*, 1984 AMC 1094, 1095 (S.D.Tex. 1981), *affirmed* 698 F.2d 1215 (5th Cir. 1983); Schoenbaum, *Admiralty and Maritime Law* § 14-7, at 851 (3rd ed. 2001). Rather, the law of finds supplements or acts as an adjunct to the law of salvage. *Id.*

In a general sense, the law of salvage is focused on the concept of possession and applies when one finds property that belongs to another. Schoenbaum,

Admiralty and Maritime Law § 14-7, at 851. The law of finds, on the other hand, is focused on the concept of title and applies only when one finds property that has been abandoned by its previous owners. *Id.* As discussed below, there is no uniformity among the circuits as to what constitutes abandonment and, hence, no uniformity as to when the law of finds applies. Indeed, in practice, the United States Court of Appeals for the Fourth Circuit operates under a different definition of abandonment and a different understanding of when the law of finds applies than do other circuit courts of the United States. However, as evidenced in a recent decision by the Fourth Circuit, there is no debate that the law of salvage and the law of finds can work in concert.

In *Columbus-America Discovery Group v. Atlantic Mut. Ins. Co.*, 56 F.3d 556 (4th Cir. 1995), the Court of Appeals directly acknowledged and endorsed the fact that a court in an *in rem* proceeding could simultaneously combine an award under the law of salvage with an award under the law of finds. In that case, a salvage company, Columbus-America Discovery Group ("CADG"), discovered the 1857 wreck of the S.S. CENTRAL AMERICA, a passenger ship carrying a substantial amount of gold, and moved the District Court to declare it the owner of the gold and other artifacts aboard the sunken vessel. *Id.* at 561. British and American insurers and their successors-in-interest opposed CADG's motion, asserting that they had underwritten the risk of loss of a portion of the gold and had paid claims filed in the aftermath of the wreck. *Id.* The District Court found that the insurance underwriters had abandoned any interest in the gold and awarded CADG title to it all under the law of

finds. *Id.* On appeal, the Court of Appeals found that the District Court had erred in applying the law of finds rather than the law of salvage. *Id.* On remand, the District Court applied the law of salvage and awarded CADG ninety percent of the gold as a salvage award, with the remaining ten percent to go to the underwriters. *Id.* at 562. However, on appeal, the Court of Appeals held that the underwriters were not automatically entitled to the remaining ten percent and remanded the case to the district court to determine whether each underwriter actually owned the portion of the gold that it claimed. *Id.* at 575. In the Opinion remanding the case, the Court of Appeals noted, absent adequate proof of ownership by the underwriters, CADG (the salvor that had been awarded ninety percent of the gold under the law of salvage) should retain the remaining ten percent of the gold under the law of finds. *Id. citing Columbus-America Discovery Group v. Atlantic Mut. Ins. Co.*, 974 F.2d 450, 465 (4th Cir. 1992) *cert. denied*, 507 U.S. 1000 (1993).

The instant case simply presents another situation in which a court in an *in rem* admiralty proceeding simultaneously combined an award under the law of salvage with an award under the law of finds. In the instant case, in 1994, the District Court, acting pursuant to the law of salvage and the law of finds, simultaneously made, in one order, three distinct awards to RMST. A 97-8. First, the District Court awarded RMST **exclusive salvage rights over the wreck and wreck site** of the TITANIC. A 98. Entered pursuant to the law of salvage, the terms of the award were typical in the context of shipwreck cases and allowed RMST to conduct its search and recovery efforts free from the interference of other entities.

Second, the District Court recognized RMST's **title to all of the items** it had previously recovered from the wreck, pursuant to the law of finds. A 98. Obviously, no salvage award analysis was necessary in recognizing RMST's title. The award was unexceptional in the context of shipwreck cases as it gave RMST title to items over which the company had exerted significant control and possession and items to which no one had made claim.[1] A 98. Third, the District Court awarded RMST title to all items it recovered from the wreck in the future, so long as the company remained the exclusive salvor of the wreck. A 98. Entered pursuant to both the law of finds and the law of salvage, the award logically combined the purposes of the two fields of law. Since the law of finds is based upon the old adage "finders keepers, losers weepers" and requires a finder to exert a very high degree of control over the property to which the finder seeks to acquire title, it makes sense to pair the award of title to future recovered items with the maintenance of salvor-in-possession status because, should a salvor-in-possession like RMST lose such status, its claim to the abandoned items lying outside the jurisdiction of the District Court in international waters, and yet to be recovered, would be no better than that of any other salvor interested in recovering them. A25-6.

Thus, the June 7, 1994 Order of the District Court draws upon both the law of salvage and the law of finds. However, the incorporation of the two fields

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[1]As discussed above, the only claim filed in the case was dismissed with prejudice following compromise and settlement by Liverpool & London and RMST. A95-6.

of law into one order does not render that order ambiguous or inappropriate. Rather, the terms of the Order, and the awards it makes, are clear and consistent with both the law of salvage and the law of finds.

III. Conflict and Confusion Reign in the Circuit Courts as There is No Uniformity on the Issue of Abandonment

As noted above, the law of salvage is focused on the concept of possession and applies when one finds property that belongs to another. Schoenbaum, *Admiralty and Maritime Law* § 14-7, at 851. The law of finds, on the other hand, is focused on the concept of title and applies only when one finds property that has been abandoned by its previous owners. *Id.* However, as the Fourth Circuit noted in *Columbus-America Discovery Group v. Atlantic Mutual Ins. Co.*, 203 F.3d 291 (4th Cir.), *cert. denied*, 531 U.S. 918 (2000), there is no uniformity among the circuits as to what constitutes "abandonment":

> Columbus-America submits that the panel majority opinion in *Columbus-America Discovery Group v. Atlantic Mutual Ins. Co.*, 974 F.2d 450 (4th Cir. 1992), *cert. denied*, 507 U.S. 1000, 123 L.Ed 2d 183, 113 S.Ct. 1625 (1993), applied a test for abandonment inconsistent with traditional maritime law. . . **After examination of the cases cited by Columbus-America, we agree that the majority's abandonment test was rejected by two other courts of appeal,**

> the Ninth Circuit in *Deep Sea Research, Inc. v. The Brother Jonathan*, 102 F.3d 379, 387-88 (9th Cir. 1996), *aff'd in part, vacated in part on other grounds, and remanded*, 118 S.Ct. 1464 (1998), and the Sixth Circuit in *Fairport International Exploration, Inc. v. The Shipwrecked Vessel Known as the Captain Lawrence, in rem*, 105 F.3d 1078 (6th Cir. 1997), *vacated and remanded on other grounds*, 118 S.Ct. 1558 (1998). **The Supreme Court, however, did not define abandonment when it reviewed Brother Jonathan.** *California v. Deep Sea Research, Inc.*, 523 U.S. 491, 118 S.Ct. 1464, 1473, 140 L.Ed.2d 626 (1998)(leaving the issue of whether the Brother Jonathan was abandoned under the Abandoned Shipwreck Act for reconsideration on remand). **The Court either declined to or simply did not resolve the conflict among the Sixth, Ninth, and Fourth circuits regarding the test for abandonment** . . . (emphasis added)

Columbus-America Discovery Group, 203 F.3d at 303-304. Due to such conflict and lack of uniformity, maritime law is dangerously unsettled. Thus, it is time for this Court to establish a uniform national standard of abandonment.

In interpreting the June 7, 1994 Order of the District Court to convey to RMST only exclusive salvage rights to the wreck of the TITANIC, not title to the items recovered from the sunken vessel, the Fourth Circuit has fallen prey to the uncertainty over what

constitutes abandonment of shipwrecks. More specifically, the Fourth Circuit has incorrectly rejected the concept of implied abandonment, a concept well-established in cases involving historic shipwrecks in other circuits. *See, e.g., Fairport International Exploration, Inc. v. The Shipwrecked Vessel known as the Captain Lawrence*, 245 F.3d 857 (6th Cir. 2001), *cert. denied*, 122 S.Ct. 544 (2001); *Martha's Vineyard Scuba Headquarters, Inc. v. The Unidentified, Wrecked and Abandoned Steam Vessel, etc.*, 833 F.2d 1059 (1st Cir. 1987); *Treasure Salvors, Inc. v. The Unidentified, Wrecked and Abandoned Sailing*, 569 F.2d 330 (5th Cir. 1978); *Klein v. The Unidentified, Wrecked and Abandoned Sailing Vessel, etc.*, 758 F.2d 1511 (11th Cir. 1985). In the process, the Fourth Circuit has, for all intents and purposes, embraced the notion that there can be no abandonment, and, hence, no application of the law of finds, in the absence of an express declaration of abandonment by the owners of a sunken ship. *See, e.g., Sea Hunt v. The Unidentified Shipwrecked Vessel or Vessels*, 221 F.3d 634, 647 (4th Cir. 2000). However, as a review of leading cases from other circuit courts reveals, the Fourth Circuit's opinion on the matter is in the distinct minority and is based on questionable legal principles.

In *Fairport International*, 245 F.3d at 857, a salvage company, Fairport International, filed an *in rem* action asking the district court to declare it the sole owner and exclusive salvor of the CAPTAIN LAWRENCE, a vessel that had sunk in Lake Michigan in 1933 and had been discovered and initially salvaged by Fairport International in 1984. *Fairport International*, 177 F.3d 493-94. The state of Michigan intervened in the case, claiming ownership of the vessel. *Id.* at 494. The district court found that Michigan had a colorable

claim of ownership in the wreck and that the Eleventh Amendment and the Abandoned Shipwreck Act of 1987 prohibited any claim against the state. *Id.*

On appeal, the Sixth Circuit directly addressed the concept of implied abandonment and the application of the law of finds. While limiting its holding to vessels formerly owned by private parties, the Court rejected any notion that abandonment must be express before the law of finds can be applied to a shipwreck and held that abandonment may be inferred from circumstantial evidence. *Id.* at 500. As the Court explained, factors such as lapse of time, non-use by an owner, the place of the shipwreck and the actions and conduct of the parties having ownership rights in the vessel may give rise to an inference of an intent to abandon. *Id.*

In *Martha's Vineyard, supra,* the First Circuit employed similar reasoning regarding implied abandonment and the application of the law of finds to a case involving a shipwreck. *Martha's Vineyard,* 833 F.2d at 1065. In *Martha's Vineyard,* Martha's Vineyard Scuba Headquarters, Inc. ("MAVIS") discovered the wreck of the S.S. REPUBLIC, a White Star ocean liner (like TITANIC) that had sunk in three hundred feet of water sixty miles south of Nantucket in 1909. Shortly after discovering the REPUBLIC in 1982, MAVIS filed an *in rem* action in district court seeking exclusive salvage rights to the sunken vessel. *Id.* at 1061. In 1993, the district court awarded MAVIS salvor-in-possession status and allowed the company to proceed with salvage operations. *Id.* However, the REPUBLIC remained unsalvaged until 1986 when a competing salvor, Marshallton, Inc. intervened and sought

permission to salvage the site. *Id.* The district court granted Marshallton such permission and, following the completion of a successful salvage expedition by the rival salvor, awarded Marshallton title to all of the artifacts that it had recovered. *Id.* at 1062. MAVIS, in turn, appealed the district court's award of title. *Id.*

On appeal, the First Circuit affirmed the district court's award of title to Marshallton. *Id.* at 1065. In so doing, the Court considered whether title to the artifacts recovered from the REPUBLIC by Marshallton should be governed by the law of finds or by the law of salvage. *Id.* Noting that the REPUBLIC had sunk many decades ago, that no person or firm had appeared to assert any overall claim of ownership to the vessel after MAVIS had instituted its *in rem* proceeding, and that Marshallton had exercised control over the artifacts in question by recovering them and bringing them to the district court, the Court found that the REPUBLIC and its cargo were presumptively abandoned and that the law of finds should apply. *Id.* *See also Klein v. The Unidentified, Wrecked and Abandoned Sailing Vessel, etc.*, 758 F.2d at 1511, 1514 (applying law of finds to sunken 18th century English vessel); *Treasure Salvors, Inc. v. The Unidentified, Wrecked and Abandoned Sailing*, 569 F.2d at 330-37 (applying the law of finds to 1622 wreck of Spanish galleon); *Marex International, Inc. v. The Unidentified, Wrecked and Abandoned Vessel*, 952 F. Supp. 825 (S.D. Ga. 1997) (finding implied abandonment, applying law of finds and awarding salvor title to any and all artifacts previously recovered from 1840 wreck of S.S. NORTH CAROLINA); *Moyer v. The Wrecked and Abandoned Vessel*, 836 F. Supp. 1099 (D. N.J. 1993)(finding implied abandonment, applying law

of finds and awarding salvor title to mosaic friezes salvaged from 1956 wreck of ANDREA DORIA); *Chance v. Certain Artifacts*, 606 F. Supp. 801 (S.D. Ga. 1984)(applying the law of finds to 1863 wreck of the NASHVILLE), *aff'd* 775 F.2d 302 (11th Cir. 1986).

Thus, based on the reasoning articulated in cases like *Fairport International, Martha's Vineyard, Treasure Salvors, Klein, Chance, Marex* and *Moyer*, it is clear that abandonment can be express or implied in cases involving shipwrecks. Grounded in reality, the concept of implied abandonment provides courts with the ability to resolve ownership questions involving shipwrecks in a more just and pragmatic manner. However, while the Fourth Circuit seems to acknowledge, in theory, the concept of implied abandonment, in practice, it holds litigants to a "more stringent" standard, one that requires express abandonment. *Columbus-America Discovery Group v. Atlantic Mutual Insurance Company, supra*, 203 F.3d at 304; *see also Sea Hunt v. The Unidentified Shipwrecked Vessel or Vessels*, 221 F.3d at 641 (acknowledging existence of concept of implied abandonment, but requiring express abandonment in case involving Spanish vessels sunk off the coast of Virginia in 1750 and 1802 where current government of Spain asserted claim to both wrecks).

IV. There Must be Uniformity in Maritime Law

It is well-established that maritime law must have uniform standards and that those standards must be uniformly applied throughout the country. *See Knickerbocker Ice Co. v. Steward*, 253 U.S. 149, 163-64

(1920); *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 217 (1917); *The Lottawanna*, 88 U.S. (21 Wall.) 558, 575, 22 L.Ed. 654 (1875). However, as the foregoing discussion of the conflict among the Fourth Circuit and other circuits reveals, there are no uniform standards as to what constitutes abandonment in cases involving shipwrecks, let alone any uniform application of such standards. Thus, the need for a Supreme Court ruling on the issue is imperative.

In the absence of such a ruling by this Court, the uniformity of maritime law is critically undermined. "Forum-shopping" will ensue as similarly-situated litigants will continue to face the unacceptable prospect of receiving dissimilar treatment depending on the jurisdiction in which they find themselves. Moreover, through an act of misguided judicial magic, shipwrecks will, in the Fourth Circuit, at least, always remain the property of their original owners. As a result, the incentive for locating such wrecks will be limited as the finders of the sunken vessels, forced to prove express abandonment by clear and convincing evidence, will almost never obtain ownership of the fruits of their vast labor. Of course, with many wrecks of great historic, cultural, and archaeological value still undiscovered beneath the ocean, the real victim, should this Court fail to act, will be the public as a whole because the necessary incentive for the recovery of such vessels will be forever undermined.

V. The Court of Appeals' Interpretation of the June 7, 1994 Order of the District Court Rejects the Concept of Implied Abandonment and is Inconsistent with the Law of Finds as Applied in Other Circuits

As revealed by all of the cases discussed above, courts that endorse the concept of implied abandonment base an inference of abandonment on factors such as age or the lapse of time between vessel sinking and the award of title, the existence of technology necessary to recover the vessel, the open and obvious nature of recovery efforts, and the failure of anyone to come forward to claim the vessel. *See also* Schoenbaum, Admiralty and Maritime Law § 14-7, at 853-54. In the instant case, many factors point toward a finding of abandonment. First of all, there was a significant lapse of time from the date the White Star liner TITANIC sank in 1912 to the date the District Court entered its June 7, 1994 order awarding RMST title to the objects it had previously recovered from the wreck, title to any objects it might recover in the future and exclusive salvage rights. Indeed, the 82 year lapse of time in the instant case exceeds the lapse of time between vessel sinking and the award of title in *Fairport International* (51 years), *Martha's Vineyard* (73 years) and *Moyer* (37 years). Second, while the wreck of the TITANIC (a White Star liner) is not as old as the Spanish galleons at issue in *Treasure Salvors*, it is virtually the same age as the 1909 wreck of the REPUBLIC (a White Star liner) in *Martha's Vineyard* and is older than both the 1933 wreck of the CAPTAIN LAWRENCE in *Fairport International* and the 1956 wreck of the ANDREA DORIA in *Moyer*. Third, the

technology needed to recover the wreck of the TITANIC has existed since the late 1960s. *Titanic Maritime Memorial Act: Hearing on H.R. 3272 Before the Committee on Merchant Marine and Fisheries of the House of Representatives*, 99th Cong., 1st Sess. 87-104 (1985). Fourth, the efforts of RMST to recover objects from the wreck have been nothing if not open and obvious given the enormous publicity afforded the TITANIC and TITANIC exhibitions (now seen by over 10 million visitors) since the discovery of the wreck.

Finally, and most importantly, as in *Martha's Vineyard, Treasure Salvors, Marex,* and *Moyer,* no one has come forward to claim ownership of the TITANIC.[2] This is particularly significant because, in the instant case, RMST, acting pursuant to instructions of the District Court in the company's *in rem* proceeding, invited claims to the TITANIC to be made by posting notice of its arrest of the wreck. When no one came forward to claim ownership of the TITANIC, the District Court entered default judgment against all those who had failed to press a claim. A98. In the absence of any ownership claims and given the presence of all of the above-discussed factors of implied abandonment, the District Court then awarded RMST title to the items it had already recovered, title to any items it might recover in the future, so long as the company remained the salvor-in-possession of the wreck, and exclusive salvage rights to the wreck. Inherent in that award of title was an appropriate application of well-established principles of admiralty

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[2]As discussed above, the only claim filed after the arrest of the TITANIC was dismissed with prejudice following compromise and settlement by Liverpool & London and RMST. A 95-6.

law by the District Court. More specifically, inherent in the award of title was an application of the law of finds by the District Court and the related obvious implicit determination that the TITANIC had been abandoned.[3]

However, despite the presence of numerous facts that would have supported an inference of abandonment in other circuits, the Fourth Circuit Court of Appeals has implicitly reversed itself, rejected the concept of implied abandonment, and reinterpreted the June 7, 1994 Order of the District Court to convey to RMST only exclusive salvage rights to the wreck of the TITANIC, not title to the artifacts recovered from the sunken vessel. A 1-34. Such an interpretation conflicts with the law of finds as applied by the other circuit courts in *Fairport International, Martha's Vineyard, Treasure Salvors, Klein, Chance, Marex* and *Moyer, supra.*

CONCLUSION

Faced with the task of adjudicating salvage and ownership rights to a historic vessel lying in international waters, the District Court entered an Order on June 7, 1994 in the instant case that combined the law of finds and the law of salvage. Unambiguous and cognizant of the principle that the law of finds supplements the law of salvage, the Order simultaneously made three distinct awards to RMST:

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[3]As noted above, in its opening brief to the Court of Appeals, RMST expressly noted that the District Court's award of title to RMST in the June 7, 1994 Order was made pursuant to the law of finds. At that time, the June 7, 1994 Order had not been questioned by the Court of Appeals or the District Court.

1.) exclusive salvage rights to the wreck and the wreck site of the TITANIC; 2.) title to all of the items previously recovered from the wreck; 3.) title to all of the items recovered in the future, so long as RMST remained the exclusive salvor of the wreck. However, despite the clarity of the Order and the well-established relationship between the law of finds and the law of salvage, the Court of Appeals, acting *sua sponte,* declared the Order ambiguous and then construed it to convey nothing more than exclusive salvage rights to the sunken vessel. In the process, the Court of Appeals reversed an award of ownership that had stood undisturbed for nearly eight years, effectively punished RMST for having faithfully relied on the prior rulings of the District Court and the Court of Appeals, and revealed a dangerous conflict among the circuit courts of this country over what constitutes abandonment in the context of admiralty law.

While many circuits embrace the concept of implied abandonment, under which the finder of a wreck may use circumstantial evidence such as the lapse of time, the existence of technology necessary to recover the vessel, the open and obvious nature of recovery efforts, and the failure of anyone to come forward to claim the vessel to prove that the wreck was abandoned, certain circuits do not. The United States Court of Appeals for the Fourth Circuit, in particular, adheres to a significantly higher standard of express abandonment, under which the finder of a sunken vessel may only prove abandonment through an affirmative act of abandonment on the part of the owner of the vessel. The conflict created by this circuit's position is unacceptable as it undermines the uniformity of maritime law.

By granting this Petition, this Court will be able to confirm that the law of finds and the law of salvage are intertwined. Moreover, in an age of technology that is opening the ocean's floors to unprecedented shipwreck exploration, this Court will be able to resolve the conflict between the Fourth Circuit and other circuit courts over the issue of abandonment and restore uniformity to maritime law through the establishment of a national standard of abandonment, a standard that formally recognizes the concept of implied abandonment.

July 11, 2002

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PUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 01-2227
[Entered: April 12, 2002]

R.M.S. TITANIC, INCORPORATED,
successor in interest to Titanic Ventures,
limited partnership,

Plaintiff-Appellant,

v.

THE WRECKED AND ABANDONED VESSEL,
its engines, tackle apparel, appurtenances, cargo, etc.,
located within one (1) nautical mile of a point located
at 41° 43' 32" North Latitude and 49° 56' 49" West
Longitude, believed to be the R.M.S. Titanic, in rem;
ROBERT C. BLUMBERG, Attorney-Advisor, Office of
Oceans Affairs, United States Department of State;
OLE VARMER, Attorney-Advisor, National Oceanic
and Atmospheric Administration,
United States Department of Commerce;
MADELEINE K. ALBRIGHT, Secretary of State,
United States Department of State;
WILLIAM M.DALEY, Secretary of Commerce,
United States Department of Commerce;
D. JAMES BAKER, Administrator, National Oceanic
And Atmospheric Administration,
United States Department of Commerce,

Defendants,

LIVERPOOL AND LONDON STEAMSHIP
PROTECTION AND INDEMNITY
ASSOCIATION, LIMITED,

Claimant,

DEEP OCEAN EXPEDITIONS;
WILDWINGS WORLDWIDE TRAVEL;
BAKERS WORLD TRAVEL;
QUARK EXPEDITIONS, INCORPORATED;
MIKE MCDOWELL; RALPH WHITE;
DON WALSH, Ph.D.; ALFRED S. MCLAREN, Ph.D.;
CHRISTOPHER S. HAVER;
R/V AKADEMIK MSTISLAV KELDYSH;
UNITED STATES OF AMERICA;
BLACKHAWK TELEVISION,

Parties in Interest,

JOHN A. JOSLYN,

Movant.

UNIVERSITY OF VIRGINIA APPELLATE
LITIGATION CLINIC; DAVID SHUTTLE,

Amici Curiae.

Appeal from the United States District Court
for the Eastern District of Virginia, at Norfolk.
Rebecca B. Smith, District Judge;
J. Calvitt Clarke, Jr., Senior District Judge.
(CA-93-902-N)

Argued: February 25, 2002
Decided: April 12, 2002

Before WILKINS, NIEMEYER, and KING,
Circuit Judges.

Affirmed by published opinion. Judge Niemeyer wrote the opinion, in which Judge Wilkins and Judge King joined.

COUNSEL

ARGUED: Mark Steven Davis, CARR & PORTER, L.L.C., Portsmouth, Virginia, for Appellant. Neal Lawrence Walters, Appellate Litigation Clinic, UNIVERSITY OF VIRGINIA SCHOOL OF LAW, Charlottesville, Virginia, for Amicus Curiae Clinic. **ON BRIEF:** Robert C. Scaro, Jr., Mark A. Stallings, CARR & PORTER, L.L.C., Portsmouth, Virginia, for Appellant. Craig A. Markham, ELDERKIN, MARTIN, KELLY & MESSINA, Erie, Pennsylvania, for Amicus Curiae Shuttle.

OPINION

NIEMEYER, Circuit Judge:

R.M.S. Titanic, Inc. ("RMST"), as salvor-in-possession of the submerged wreck of the *R.M.S. Titanic* and the artifacts salvaged from it, challenges the district court's orders of September 26, 2001, and October 19, 2001. These orders were entered after the court discovered RMST's plans to sell some of the artifacts and confirmed that the court's earlier orders prohibiting the sale of artifacts "were proper and were necessary when entered." RMST contends that, because in 1994 it was granted absolute title to all the artifacts it

retrieved, the district court cannot now restrict its right, as owner of the artifacts, to sell them at its discretion.

Finding that RMST's arguments are grounded on a fundamental misunderstanding of its role as salvor-in-possession, we reject its arguments and affirm the orders of the district court.

I

In 1985, a joint American-French expedition discovered the wreck of the *Titanic* in the North Atlantic Ocean in international waters. Two years later, Titanic Ventures, a limited partnership, explored the wreck, bringing up approximately 1,800 artifacts. Thereafter, it sold its interests in the salvage operations and the artifacts to RMST.

In 1993, RMST commenced this *in rem* action against the *Titanic* to become its salvor-in-possession. In its complaint, RMST requested, among other things, that, under the law of finds, it be declared "the true, sole and exclusive owner of any items salvaged from the wreck" or, alternatively, that, under salvage law, it be "awarded a liberal salvage award . . . as may be determined by this Court." Acting under principles of salvage law and consistent with the inchoate lien that RMST obtained as salvor, the district court exercised *in rem* jurisdiction and issued a warrant directing the United States Marshal to arrest the wreck and all artifacts already salvaged and yet to be salvaged. Simultaneously, it ordered that RMST be substituted for the Marshal as the custodian of the wreck, the wreck site, and the artifacts. Notice of the proceedings was duly published. Following a claim made by an insurance company and settlement of that claim, the

court approved the settlement and issued an order, dated June 7, 1994, declaring RMST salvor-in-possession. In its order, the court stated:

> The Court FINDS AND ORDERS that R.M.S. Titanic, Inc. is the salvor-in-possession of the wreck . . . and that R.M.S. Titanic, Inc. is the true, sole and exclusive owner of any items salvaged from the wreck of the defendant vessel in the past and, so long as R.M.S. Titanic, Inc. remains salvor-in-possession, items salvaged in the future, and is entitled to all salvage rights . . . .

During the course of the hearing leading to this order, the district court confirmed its understanding that it was RMST's "intention to display these artifacts and to try to get [its] money back out of admissions to the display rather than selling them off." Counsel for RMST affirmed that understanding and explained further "that the process [of] going forward with the exhibition of the artifacts and not sell[ing them] continues and . . . that is the position of the salvors in this case, that the 1987 artifacts and the 1993 artifacts will not be sold, but rather will be exhibited."

Two years after entry of the June 1994 order appointing RMST salvor-in-possession, John A. Joslyn filed a motion in this action requesting that the district court rescind its June 1994 order naming RMST salvor-in-possession because RMST had failed to salvage the *Titanic* diligently and lacked the financial capacity to undertake future salvage operations. The district court rejected Joslyn's claims and denied his motion. But in

doing so, it ordered RMST to make more frequent reports to the court about its salvage efforts. *R.M.S. Titanic, Inc. v. Wrecked & Abandoned Vessel, the R.M.S. Titanic*, 924 F. Supp. 714, 724 (E.D. Va. 1996). In addition, the district court entered a preliminary injunction prohibiting Joslyn, as well as anyone else, from visiting the site of the wreck and from photographing it. *R.M.S. Titanic, Inc. v. Wrecked & Abandoned Vessel*, No. 2:93CV902, 1996 WL 650135 (E.D. Va. Aug. 13, 1996). The court reasoned that because RMST was "not selling artifacts like traditional salvors, it must be given the rights to other means of obtaining income." *Id.* at *2.

In 1998, when a British Virgin Islands corporation headquartered on the Isle of Man, Great Britain, began marketing to the public an expedition to visit the *Titanic* wreck, which it called "Operation Titanic," RMST filed a motion for a more specific injunction to prevent that corporation as well as its principals and customers from visiting and photographing the wreck site. The district court issued an expanded injunction, enjoining that corporation, as well as its principals and a named passenger, from visiting a yet more generously defined site in the North Atlantic and from photographing the wreck. *R.M.S. Titanic, Inc. v. Wrecked & Abandoned Vessel*, 9 F. Supp. 2d 624, 626 (E.D. Va. 1998). The court reasoned that because RMST was not selling the artifacts, it needed a stream of income, and the exclusive photographic and visitation rights would help insure this income. *Id.* at 635-36. We reversed that order, concluding that it was beyond the power of the district court and inconsistent with salvage law to confer those rights: "Neither prohibition is justified by the law of salvage or allowed

by the law of free navigation on the high seas." *R.M.S. Titanic, Inc. v. Haver*, 171 F.3d 943, 970 (4th Cir. 1999). RMST maintains that this refusal to give it exclusive visitation and photographic rights has had a substantial adverse impact on its income stream and has impaired its ability to finance further salvage operations.

RMST has continued to conduct salvage operations and to display the artifacts recovered in order to obtain income. In November 1999, the management of RMST changed, and the new management articulated a new business plan designed "to maximize shareholder value while still protecting the archeological and historical value of the wreck." While the financial strategy of RMST's previous management had focused on generating earnings through the exhibition of artifacts, RMST's new management expanded this strategic plan to include "the possible disposition of artifacts to increase revenues" and thereby to maintain its status as salvor-in-possession. But these plans were undeveloped, and during a hearing in March 2000, the new president of RMST testified before the district court that RMST had "no plans to sell any portion of the collection."

Several months later, however, "it [came] to the attention of the court that there ha[d] been a change in management in R.M.S. Titanic, Inc. and that there [was] a concern held by some persons and organizations that R.M.S. Titanic, Inc. [was] considering disposal of some artifacts recovered." In response to this information, the district court issued an order *sua sponte*, dated July 28, 2000, directing RMST "not [to] sell or otherwise dispose of any artifacts or any object recovered from the wreck site and further that it must continue to treat and

preserve any such artifacts and objects recovered from the wreck site." In its order, the court noted that"[t]his court has continued R.M.S. Titanic, Inc. as salvor-in-possession of the wreck of the *Titanic* from year to year on the understanding that R.M.S. Titanic, Inc. would treat and preserve all artifacts recovered and would exhibit them to the public and would not sell or dispose of any of said artifacts."

In its periodic report to the court several weeks later, RMST acknowledged the court's July 2000 order, stating, "RMST notes that since it had never sold any artifacts or objects recovered from the *Titanic* without first advising the Court (i.e. sales of coal and encumbrance of coins and currencies), and since it had advised the Court earlier in its July 5, 2000 periodic report that it would not cut into the wreck, the only new effect of the [July 28] order was the prohibition on detaching any part of the wreck." Consistent with this position, RMST did not appeal the district court's July 2000 order prohibiting the sale or dispersion of the artifacts.

In April 2001, RMST sought a clarification of the July 2000 order to permit it to sell the coal it had recovered from the wreck. During the hearing on this issue, RMST broached, for the first time, plans to form a new foundation which might "explore the acquisition of the artifact collections at some time in the future." RMST's counsel explained that the "desire on the part of [RMST] to explore transfer . . . raise[d] some questions . . . with the [July 2000] order," which had confirmed the prohibition against selling any artifacts. On the issue of whether selling coal – which RMST had already done – violated the court's orders, counsel explained that coal recovered from the site was always treated as "organic matter, rather than artifacts,"

and that RMST had always felt free to sell coal. After the court invited RMST to submit a clarifying order authorizing the sale of coal, the court reiterated its position about selling artifacts:

> You have to remember now that during the whole time that R.M.S. Titanic has worked with the court, they have always taken the position that they are not going to sell any artifacts, that their purpose in getting them is to get them, preserve them, and put them on display.

Counsel for RMST confirmed the court's understanding, stating, "That is exactly what has been represented to the court. The company has never taken the position that it wanted to sell the artifacts." In accordance with the hearing, the district court signed an order dated April 30, 2001, modifying the July 28, 2000 order "to reflect the fact that the Salvor remains free to sell or encumber any coal that it has recovered or that it might recover in the future from the TITANIC wreck site." Again, RMST did not appeal this modification of the July 2000 order.

Beginning in July 2001, RMST's gently leaked idea to form a foundation became concrete, and RMST submitted a supplemental report to the court, describing the formation of The Titanic Foundation, Inc. and the Foundation's interest in purchasing the artifacts from RMST. Upon receiving the report, the district court issued an order, again *sua sponte*, dated July 31, 2001, reiterating that RMST could not "convey in any manner any of the R.M.S. Titanic's artifacts" until the court had held a full hearing.

That hearing was held on September 24, 2001. The court then learned in detail about the formation of The Titanic Foundation and noted that the principals of RMST and The Titanic Foundation were the same people, observing "so it is really a one man show; is that not right?" The court noted that this might create irreconcilable conflicts of interest with respect to the principals' duties to both the public corporation and the nonprofit foundation. Counsel for RMST explained that the foundation would be able to solicit charitable contributions which then could be used to purchase the artifacts. Counsel justified the need for the foundation in part by our decision in *Haver*, in which we denied RMST exclusive rights to visit the site and to photograph the wreck. 171 F.3d at 971. At the hearing, the district court did not reject the notion that the collection of artifacts as a whole – rather than piecemeal – could possibly be sold pursuant to an acceptable plan, approved by the court. But counsel then explained a practical difficulty in having to obtain the court's approval of any such transfer of artifacts. As counsel explained, approval "puts the company in a very awkward position in dealing with those who want to acquire collections, in that you have to say to them, well, do your due diligence, you go out and get your appraisal, you do everything else that you have to do, and then we as a company will do the things that we have to do. . . . So it requires opinions, various things that have to be done for due diligence, and then to the potential acquirer, we will come to the court and ask for approval of that." After the court explained the difficulty in foregoing approval, it stated that,"[t]here is no sense in the court or your taking the time to decide some abstract question. If you have got some sort of an

agreement or deal worked out, submit that to the court, and the court will say whether or not it approves it." Following the hearing and apparently out of concern over the possibility that artifacts might be sold, the district court entered another order, dated September 26, 2001, stating:

> The Court FINDS after the September 24, 2001 hearing that its previous Orders entered in this case, designed to prevent sales of individual artifacts recovered from the Wreck of R.M.S. Titanic, were proper and were necessary when entered.

Two weeks later, RMST appealed that order. And after RMST appealed the September 26 order, the district court entered another order dated October 19, 2001, amending the September 26 order, essentially explaining its position, as well as earlier orders. In its explanation, the court indicated that it first learned in April 2001 of the possibility that RMST might convey the collection and recognized "that circumstances change and it becomes necessary to change plans and approaches." The court invited further motions on the disposition of artifacts. RMST appealed this October 19, 2001 order as well.

Because there was no party in opposition to represent the district court's position, this court asked the University of Virginia School of Law's Appellate Litigation Clinic to file an *amicus* brief to serve as the answering brief. The clinic did so ably, and we have considered the arguments of both RMST and its counsel as well as counsel from the clinic.

II

The *amicus* appropriately raises the question of whether we have jurisdiction to review the September 26 and October 19, 2001 orders. RMST has asserted jurisdiction under 28 U.S.C. § 1292(a)(1) (authorizing appeals of interlocutory orders "granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions") and 28 U.S.C. § 1292(a)(3) (authorizing appeals of interlocutory decrees "determining the rights and liabilities of the parties to admiralty cases").

The *amicus* argues that RMST cannot appeal under § 1292(a)(1) because: (1) RMST consented earlier to the same order of July 28, 2000, *see Haitian Refugee Ctr. v. Civiletti*, 614 F.2d 92, 93 (5th Cir. 1980); (2) no factual or legal change has occurred to justify appealing an ongoing injunction which RMST did not earlier appeal, *see SEC v. Suter*, 832 F.2d 988, 990 (7th Cir. 1987); and (3) the district court left open alternative avenues of relief, inviting RMST to submit a formal motion for approval of any new deal. Also challenging jurisdiction under § 1292(a)(3), the *amicus* argues that Congress limited interlocutory review in admiralty cases to interlocutory decrees that determine rights and liabilities, and it did not grant a right to appeal every interim order. *See Pickle v. Char Lee Seafood, Inc.*, 174 F.3d 444, 448 n.1 (4th Cir. 1999); *Evergreen Int'l (USA) Corp. v. Standard Warehouse*, 33 F.3d 420, 425 (4th Cir. 1994).

We agree with the *amicus* that if RMST is appealing orders under § 1292(a)(1) that simply clarify or interpret earlier orders that it failed to appeal, its appeal rights would be forfeited by its failure to appeal

the earlier orders. *See, e.g., Major v. Orthopedic Equip. Co.*, 561 F.2d 1112, 1115 (4th Cir. 1977) (holding that court lacked jurisdiction on appeal from injunction because the order was "simply an interpretation" of an earlier order). This principle is based on the notion that the more recent appealed orders add nothing in substance to earlier orders left unappealed. If either of the appealed orders, on the other hand, modifies the substance of an earlier order or extends its duration, the new order is appealable under § 1292(a)(1). *See, e.g., Pickle*, 174 F.3d at 448 (finding appealable an order that denied a party's request for modification of an injunction); *Sierra Club v. Marsh*, 907 F.2d 210, 213-14 (1st Cir. 1990) (noting that an order that extends or prolongs the restraint imposed by an earlier order is appealable). Similarly, if the factual and legal circumstances applicable to an earlier order change, the substantive effect of a restated injunction may cause it to become appealable. *See, e.g., Suter*, 832 F.2d at 990 (suggesting that "changes in fact of law since [the injunction's] entry" may justify an appeal).

The question of jurisdiction in this case is a close one which RMST could have made easier by filing in the district court a motion to vacate or modify the July 28, 2000 injunction, based on the new factual developments. Although RMST filed no such motion, it advances a persuasive argument that the periodic reports and hearings prior to the orders appealed in this case provide support for a position that the circumstances had changed and that, therefore, the September 26 and October 19, 2001 orders, which were aimed at the new circumstances, had a new substantive effect.

As RMST accurately points out, the April 2001 periodic report indicated that two organizations had expressed interest in purchasing some or all of the *Titanic* artifacts, The Titanic Foundation and the Museums and Galleries of Northern Ireland. To acquire information about the possible arrangements, the court conducted a hearing on September 24, 2001, where witnesses testified about the details of a potential artifact sale to those entities. After hearing testimony about these new developments, the district court, *sua sponte*, issued the September 26 and October 19, 2001 orders from which RMST appealed.

RMST suggests that not only did the September 26 and October 19, 2001 orders focus on the new developments, but in substance they also extended the scope of the earlier injunctions to cover new circumstances. It argues that the district court itself observed that the court had earlier only prohibited the sale of *individual* artifacts but had never enjoined the sale of the artifacts as a collection. With its September 26 and October 19 orders, the court was enjoining any sale of the artifacts "as a group."

We believe that the new developments that preceded the September 26 and October 19 orders were sufficiently material as to justify RMST's challenge to the renewed injunctions entered following the hearing on September 24, 2001. While the court may not have explicitly expanded its earlier injunctions, it acknowledged that the earlier injunctions were "designed to prevent sales of *individual* artifacts" and that it would consider a modification of them if the modification was "designed to keep the recovered and to-be-recovered artifacts together as a group." The court also acknowledged that "circumstances change

and it becomes necessary to change plans and approaches."

Moreover, this case presents the rare circumstance that might render a later review of these interlocutory orders impossible. It is unclear how long the *in rem* action will continue because it is unclear how long salvage will continue. It could be years depending on RMST's capacity, will, and diligent performance of salvage services. Because no final termination of these proceedings is currently in sight, RMST could be left without a remedy for challenging the two orders entered in light of the new developments.

Accordingly, in the peculiar circumstances before us, we conclude that we have jurisdiction under 28 U.S.C. § 1292(a)(1). We need not, therefore, reach the question of whether this case presents a decree appealable under 28 U.S.C. § 1292(a)(3).

III

On the merits, RMST, relying heavily on language taken from the district court's June 7, 1994 order appointing RMST salvor-in-possession, directs our focus to the district court's declaration in that order that RMST "is the *true, sole and exclusive owner* of any items salvaged from the wreck of the defendant vessel in the past and, so long as [RMST] remains salvor-in-possession, items salvaged in the future, and is entitled to all salvage rights." (Emphasis added). RMST maintains that, for several reasons, this language confirms that it became the absolute owner of the artifacts, free and clear, as they were retrieved from the *Titanic* and, therefore, that it is entitled to sell them,

notwithstanding its earlier expressions to the court of an intent not to sell them.

Specifically, RMST argues first that there were no "contingencies or exceptions" to the district court's "*in specie*" award. Second, RMST maintains that the maritime law "does not permit a District Court to impose such restrictions on disposition of artifacts, awarded *in specie*, for some perceived public benefit. These restrictions equate to a 'taking' of private property." Third, RMST asserts that the district court had no justification for "converting statements by RMST regarding a business plan into a binding restriction upon disposition of items recovered from the wreck." Fourth, RMST observes that the district court speaks only through its orders and not through its opinions, whether oral or written, and its June 1994 order contains no restrictions on disposition. Fifth, RMST argues that the doctrine of judicial estoppel is inapplicable to its statements of intent about not selling the artifacts because it never made misleading statements to the court in order to obtain any benefit. And finally, RMST contends that the restrictions are substantively "inappropriate" in view of the public policy behind salvage law, arguing that the restrictions against resale of the artifacts actually inhibit incentives to perform salvage operations and that RMST, as a publicly traded company, "has an obligation to maximize shareholder value," which should be considered. Indeed, the adverse effects of the district court's orders on the continuing financial viability of RMST runs throughout RMST's arguments that the court acted illegally and inappropriately.

Before addressing RMST's specific arguments, it is necessary to set forth the relevant fundamental

principles of salvage law and to recognize the significance of this case as an *in rem* proceeding instituted under the salvage law to enforce RMST's inchoate lien for a salvage reward.

A

A salvor in admiralty is one who voluntarily saves life or property at sea. Because of the dangers of the sea and the mutual interest of seamen and seafaring nations to traverse the sea notwithstanding its dangers, the law of admiralty for almost 3,000 years has uniformly held that those who voluntarily come to the assistance of fellow seamen in distress and perform salvage are entitled to be rewarded. *Haver*, 171 F.3d at 962; *see generally* Martin J. Norris, 3A *Benedict on Admiralty* §§ 5-13 (7th ed. 1998). As Chief Justice Marshall eloquently explained, this is a policy for seamen, not landlubbers:

> If the property of an individual on land be exposed to the greatest peril, and be saved by the voluntary exertions of any person whatever; if valuable goods be rescued from a house in flames, at the imminent hazard of life by the salvor, no remuneration in the shape of salvage is allowed. The act is highly meritorious, and the service is as great as if rendered at sea. Yet the claim for salvage could not, perhaps, be supported. It is certainly not made. Let precisely the same service, at precisely the same hazard, be rendered at sea, and a very ample award will be bestowed in the courts of justice.

Mason v. The Ship Blaireau, 6 U.S. (2 Cranch) 240, 266 (1804). By saving property at sea, salvors do not become the property's owner; rather, they save it for the owners and become entitled to a reward from the owner or from his property. *Haver*, 171 F.3d at 963; *The Amethyst*, 1 F. Cas. 762, 764 (D. Me. 1840) (No. 330) (stating that a salvor stands as a "voluntary agent" and thus is "bound to act for the interest of the owner as well as his own"). The reward provides an incentive for rendering salvage service at sea, and courts of admiralty have long enforced claims to this award against owners. *Mason*, 6 U.S. (2 Cranch) at 266 (allowing "a very ample compensation for those services, (one very much exceeding the mere risk encountered, and labour employed in effecting them)"). As one court early explained:

> Salvage, it is true, is not a question of compensation *pro opera et labore*. It rises to a higher dignity. It takes its source in a deeper policy. It combines with private merit and individual sacrifices larger considerations of the public good, of commercial liberality, and of international justice. It offers, a premium, by way of honorary award, for prompt and ready assistance to human sufferings; for a bold and fearless intrepidity; and for that affecting chivalry, which forgets itself in an anxiety to save property, as well as life.

The Henry Ewbank, 11 F. Cas. 1166, 1170 (D. Mass. 1833) (No. 6,376).

The principal method of enforcing a salvor's award is through the recognition of a salvor's lien in the property saved. *The Sabine*, 101 U.S. 384, 386 (1879) (explaining that a salvage lien "ordinarily affords the best mode of securing the payment of [a salvor's] claims"); *Haver*, 171 F.3d at 963. This maritime lien arises from the moment salvage service is performed, *United States v. ZP Chandon*, 889 F.2d 233, 237 (9th Cir. 1989), and, as with any other lien, secures the payment of the as-yet-to-be-determined salvage award. Such liens are a temporary encumbrance of the property saved, lasting only until payment of a salvage award can be made. *The Everosa*, 93 F.2d 732, 735 (1st Cir. 1937).

Although there are substantive differences between maritime and common law liens, *see generally* Grant Gilmore & Charles Black, Jr., *The Law of Admiralty* § 9.1 - 9.2 (2d ed. 1975), the maritime lien enforcement process – *i.e.*, the execution of the lien – parrots the lien foreclosure process in civil law. The process begins when the salvor commences an *in rem* proceeding in admiralty against the property. Fed. R. Civ. P., Supp. R. C(1)(a) (stating that "[a]n action in rem may be brought . . . [t]o enforce any maritime lien"); *see also Haver*, 171 F.3d at 963; *Treasure Salvors, Inc. v. The Unidentified Wrecked & Abandoned Sailing Vessel*, 640 F.2d 560, 567 (5th Cir. 1981). The salvor must provide notice of the *in rem* proceeding to the owner, other lienholders, and potential claimants to the property. Fed. R. Civ. P., Supp. R. C(4) (requiring public notice of the action and arrest if the property has not been released under Rule E).

If the owner appears and pays the salvage reward determined by the court,* the lien is discharged and the owner takes the property clear of the salvage lien. *Cf. Ferrous Financial Servs. Co. v. O/S Arctic Producer*, 567 F. Supp. 400, 401 (W.D. Wash. 1983) (permitting judicial sale to go forward because owner was in default and could not obtain bond to release arrested ship). On the other hand, if the owner does not appear, then the case continues as an *in rem* action, and the court determines the award, sells the property, and, from the proceeds, pays the salvor. Fed. R. Civ. P., Supp. R. E(9)(c). Any remainder from the sale is remitted to the owner. If the owner is no longer living, the court presumably pays the excess to the owner's heirs, and, if there are no heirs, to the state according to its escheat law.

If the sale of the salvaged property yields too little to satisfy the salvor's lien for a reward, then all of the proceeds from the sale of the salvaged property are paid to the salvor. Courts have held that an award cannot exceed the value of the property itself. Even if it

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*In determining the appropriate award, courts generally rely on the six factors set out in *The Blackwall*, 77 U.S. (10 Wall.) 1, 14 (1869):

> (1.) The labor expended by the salvors in rendering the salvage service. (2.) The promptitude, skill, and energy displayed in rendering the service and saving the property. (3.) The value of the property employed by the salvors in rendering the service, and the danger to which such property was exposed. (4.) The risk incurred by the salvors in securing the property from the impending peril. (5.) The value of the property saved. (6.) The degree of danger from which the property was rescued.

does, though, in an *in rem* proceeding, there certainly cannot be a deficiency judgment against the owner because the action is against the property and any judgment therefore is limited to the value of the property. *See Allseas Maritime, S.A. v. M/V Mimosa*, 812 F.2d 243, 246 (5th Cir. 1987) ("The salvage award is therefore limited by the value of the property saved after all of the appropriate factors are taken into account"); *Lambros Seaplane Base, Inc. v. The Batory*, 215 F.2d 228, 237 (2d Cir. 1954) (concluding that where owner did not appear to claim a salvaged seaplane, the owner could not be held personally liable to the salvor). If it becomes apparent to the court that the proceeds of any sale would clearly be inadequate to pay the salvor its full reward, then the court might, as a matter of discretion, award the salvor title to the property in lieu of the proceeds of sale, thus saving the costs of sale. The salvor does not have a direct rignt, however, to title in the property. *See Platoro Ltd. v. Unidentified Remains*, 695 F.2d 893, 903-04 (5th Cir. 1983) ("We cannot find a case where the salvage award was expressed in terms of the *res* rather than in dollars"); *Chance v. Certain Artifacts Found & Salvaged from The Nashville*, 606 F. Supp. 801, 808 (S.D. Ga. 1984) (declining "to accept the *in specie* award as a valid award in a salvage action"), *aff'd* 775 F.2d 302 (11th Cir. 1985). Rather, the salvor has only a lien on the property which may, upon execution or foreclosure and in the discretion of the court, be satisfied by the court's conveying title to the salvor after the court determines that the appropriate amount of award cannot be satisfied by a sale of the property. *Haver*, 171 F.3d at 966.

Thus, hypothetically, if RMST were to recover an artifact valued at $50 million (we know, for instance, that paintings have at times sold for more) and the court were to determine that the appropriate salvage award was $5 million, the court could not give the property to RMST in satisfaction of its salvage lien because the lien exists only to the extent of $5 million. The court instead would have to sell the property and remit to RMST $5 million from the proceeds. On the other hand, if RMST were to recover an artifact valued at $2 million (a historic vase, for example) and the court were to determine, again, that the appropriate salvage award was $5 million, a sale would be useless. In lieu of a sale to foreclose the salvage lien, the court could simply convey title in the $2 million vase to RMST, essentially providing RMST what is analogous to a "deed in lieu of foreclosure."

Once the lien is executed and the salvor as lienholder is paid its reward, whether in money or in kind, the reward becomes the property of the salvor to do with what it wants. *Point Landing Inc. v. Alabama Dry Dock & Shipbuilding Co.*, 261 F.2d 861, 866 (5th Cir. 1958) ("The [judicial] sale cuts off the rights of all non-parties. The title from the marshal is good against the world.").

It is critical to note that under salvage law, the salvor receives a lien in the property, not title to the property, and as long as the case remains a salvage case, the lienholder cannot assert a right to title even though he may end up with title following execution or foreclosure of the lien. *See, e.g., The Akaba v. Burg*, 54 F. 197, 200 (4th Cir. 1893) ("When articles are lost at sea the title of the owner in them remains"); *see also Adams v. Unione Mediterranea di Sicurta*, 220 F.3d 659, 670-71

(5th Cir. 2000) (explaining that the owner of the salvaged goods "does not lose title even though the property may become the subject of salvage services," because, through the lien, the salvor obtains only a "right of possession" in the property and not "ownership or title to the salved property") (quoting *Benedict on Admiralty* § 150); *Treasure Salvors*, 640 F.2d at 567 ("Although the law of salvage grants the salvor a right to possession of the property, the salvage of a vessel or goods at sea, even when the goods have been abandoned, does not divest the original owner of title or grant ownership rights to the salvor"); *Continental Ins. Co. v. The Clayton Hardtop Skiff*, 367 F.2d 230, 236 (3d Cir. 1966) ("The salvor has the right to salvage but he does not achieve ownership of the vessel by salving it"); *Chance*, 606 F. Supp. at 804 (stating that "even though a vessel is abandoned without the hope of recovery or return, the title of the vessel remains in her owner" and "[t]he salvor of property has a right to an award or a lien against the property"), *aff'd* 775 F.2d 302 (11th Cir. 1985); *Hener v. United States*, 525 F. Supp. 350, 357 (S.D.N.Y. 1981) (explaining that salvage law grants the salvor "only a superior right of possession, and not title, until a court has passed on title and the salvage fee" (citing *The Alaska*, 54 F. 197 (4th Cir. 1893)); *The Port Hunter*, 6 F. Supp. 1009, 1011 (D. Mass. 1934) (stating the salvors have a claim "paramount to all others" and the control to enforce the claim, "[b]ut `their interest in the goods did not amount to ownership. . . . Th[e] right is merely a lien, a right to retain the goods till the salvage be paid'") (quoting *Whitwell v. Wells*, 24 Pick (Mass.) 25, 30 (1834)); *The Carl Schurz*, 5 F. Cas. 84, 86 (W.D. Tenn. 1879) (No. 2414) (stating that the salvor "is, to all intents and purposes, a joint owner" of the

property along with the original owner); *The Amethyst*, 1 F. Cas. at 763 ("The finder of property, left derelict at sea, does not acquire the dominion or the absolute property in what is found. He acquires the right of possession only, with a title to a reasonable reward for his services").

This principle, while firm in the salvage law, does not mean that a salvage case could not be converted into a finds case. *See Platoro Ltd.*, 695 F.2d at 904 (noting that salvage awards can be made by award of title to the *res* under the law of finds); *Treasure Salvors, Inc. v. Unidentified Wrecked & Abandoned Sailing Vessel*, 569 F.2d 330, 336-37 (5th Cir. 1978) (recognizing that title to lost ships can be divested from the owner under the law of finds). Under finds law, "title to abandoned property vests in the person who reduces that property to his or her possession." *Id.* at 337. Before such a conversion is made, however, the prerequisites for divesting title under the law of finds must be satisfied. *See, e.g., Columbus-America Discovery Group v. Atl. Mut. Ins. Co.*, 974 F.2d 450, 464-65 (4th Cir. 1992) (requiring clear and convincing evidence of abandonment before the law of finds is applied).

Turning to the specifics in the case before us, RMST, as salvor, obtained an inchoate lien in the artifacts upon performing salvage service in connection with the *Titanic*, and it became entitled to enforce that lien through the *in rem* proceeding which is now pending before the district court. It did not, however, obtain a lien in any property that it merely discovered; discovery alone does not amount to salvage service, although it can lead to salvage service. *The Sabine*, 101 U.S. 384, 384 (1879) (setting out three requirements for a salvage award: existence of a marine peril, voluntary

action by the salvor, and successful salvage). When RMST performed salvage service, the district court exercised "constructive" *in rem* jurisdiction over the wreck and declared RMST the sole salvor-in-possession of the *Titanic*. *Haver*, 171 F.3d at 967. And through that order, the court gave RMST the exclusive right to salvage artifacts from the *Titanic* and to obtain a reward through enforcement of its salvor's lien in the artifacts. If and when RMST abandons its role as salvor or the court dispossesses RMST of that role, the unsalvaged wreck will remain as any other unsalvaged wreck at the bottom of the sea, subject to salvage service by others.

Many of these basic principles of salvage and lien law have been overlooked by RMST in its arguments. In addition to claiming title as a lien-holder, it has, for example, also extensively argued that the district court should have taken into account RMST's financial viability. But this issue has no relevance to whether RMST is entitled to enforce its salvage lien against the artifacts that it salvaged. When RMST voluntarily salvaged property – even with profit in mind – it became entitled only to a yet-to-be-determined reward, enforceable against the property. *The Camanche*, 75 U.S. (8 Wall.) 448, 475 (1869) (allowing recovery even by those salvors "whose business it is to be always ready and at command whenever assistance is required"); *B.V. Bureau Wijsmuller v. United States*, 702 F.2d 333, 339 (2d Cir. 1983). RMST is not entitled to a guarantee that it remain in business as a viable company to conduct salvage services. Surely if RMST abandoned its efforts, others would take over. In this case, other potential salvors have unsuccessfully petitioned the district

court to do exactly that. *See R.M.S. Titanic, Inc. v. Wrecked & Abandoned Vessel*, 924 F. Supp. 714 (E.D. Va. 1996) (rejecting claim of potential salvor to rescind RMST's salvor-in-possession rights). And if no others were to do so, then the wreck of the *Titanic* would lie unsalvaged as it did for the first 75 years after it sank.

With these important principles in hand, we now turn to address RMST's specific arguments *ad seriatim*.

B

The first and most fundamental issue raised by RMST is the meaning to be given to the district court's June 7, 1994 order. Resting on its contention that this order gave RMST full, unrestricted title to the salvaged artifacts, RMST argues as a matter of property law that the court cannot now reverse itself to impose restrictions on the disposition of the artifacts which belong to RMST.

First, it must be pointed out that the June 1994 order, drafted by counsel for RMST, is inherently ambiguous, repeating the language of RMST's complaint in which it appears that RMST sought both absolute title in the artifacts through the law of finds and salvage rights through the law of salvage. Because RMST pursued only salvage rights and the court only declared it a salvor, not a finder, any suggestion that it obtained title to the wreck of the *Titanic* is misplaced. Yet, the order submitted to give RMST salvage rights uses both salvage language and finds language. It says:

> The court FINDS AND ORDERS that R.M.S. Titanic, Inc. is the salvor-in-possession of the wreck and wreck site of the R.M.S. Titanic, including without limitation the hull, machinery, engine, tackle, apparel, appurtenances, contents and cargo, and that R.M.S. Titanic, Inc. is the true, sole and exclusive owner of any items salvaged from the wreck of the defendant vessel in the past and, so long as R.M.S. Titanic, Inc. remains salvor in possession, items salvaged in the future, and is entitled to all salvage rights, and that default judgment is entered against all potential claimants who have not yet filed claims and such claims are therefore barred and precluded so long as R.M.S. Titanic, Inc. remains salvor in possession, and the Court accordingly enters judgment in favor of R.M.S. Titanic, Inc.

Just as this order gives property rights, it also takes them away. It appears to give ownership of the artifacts to RMST — declaring RMST the "true, sole and exclusive owner" — but then in the same sentence states that RMST "is entitled to all salvage rights" as long as it maintains its role as salvor. Indeed, the lead-in to the same sentence also states that RMST is the salvor-in-possession — not the finder — of the wreck and the wreck site. Because the court was clearly applying the law of salvage and not the law of finds, it could only convey possession, not title. *Haver*, 171 F.3d at 961-62.

Moreover, contemporaneously with entry of the June 1994 order, the parties expressed their

unequivocal intent that RMST's role be that of salvor, not finder. And RMST has never argued that the *Titanic* had been abandoned and that it was entitled to full title to the entire ship and the artifacts from it, as would be required if this case progressed under the law of finds. *See Fairport Int'l Exploration, Inc. v. Shipwrecked Vessel*, 177 F.3d 491, 498 (6th Cir. 1999) (explaining that under law of finds, claimant must show that the property has been abandoned and that courts apply a presumption against abandonment); *Columbus-America*, 974 F.2d at 461, 464-65 (explaining that, in maritime law, "a strong *actus* element [is] required to prove the necessary intent" of abandonment, such as express declaration abandoning title). RMST's position that it was only the salvor is consistent with admiralty law's strong preference for recognizing persons who discover wrecks as salvors rather than finders. *See Haver*, 171 F.3d at 961; *Columbus-America*, 974 F.2d at 464 (explaining that "when sunken ships or their cargo are rescued from the bottom of the ocean by those other than the owners, courts favor applying the law of salvage over the law of finds").

Also contemporaneous with the entry of the June 1994 order, the district court and RMST understood the order's language to give RMST exclusive *possession* of the artifacts to permit RMST to earn money through the exhibition of the artifacts as an interim advance to fund further salvage efforts. But it was clear that RMST was not authorized to sell the artifacts. At the hearing before entry of the June 1994 order, the court sought reconfirmation from RMST that it had in fact advised the court of its "intention to display these artifacts and to try and get [its] money back out of admissions to the display rather than

selling them off. Is that still the intention of the *Titanic* people?" Counsel for RMST stated unequivocally, "Yes, sir, Your Honor." Co-counsel for RMST then explained further "that the 1987 artifacts and the 1993 artifacts will not be sold, but rather will be exhibited."

But of overarching importance to the party's contemporaneous understanding of the June 1994 order was the nature and status of the court proceedings. RMST had filed an *in rem* action against the *Titanic* to enforce its salvage lien. The fact that no claimants appeared – other than an insurance company, which settled – does not mean that RMST's lien in the artifacts automatically became converted to title to the artifacts. RMST must first complete the salvage service that it intends to perform and have its reward determined, unless it intends to seek periodic awards. Only after its reward is determined can it seek to enforce the lien against the artifacts themselves.

Yet none of these necessary steps had taken place as of 1994. No determination of a reward had been made; no one had submitted an appraisal of the artifacts or testified that sale of the artifacts would produce an inadequate sum to satisfy the lien. The determination of the reward itself is an involved process that encompasses evaluation of the salvage services in light of the *Blackwall* factors. *See, e.g., Margate Shipping Co. v. M/V JA Orgeron*, 143 F.3d 976, 984-85 (5th Cir. 1998) (describing the extensive district court process of evaluating *Blackwall* factors). Thus, at the early stage of the proceedings in 1994, the court could only have given RMST exclusive possession of the artifacts pending further necessary proceedings.

But even if this understanding was not apparent to RMST, the court's July 28, 2000 order made it

apparent. That order, confirming what the court believed about its June 1994 order, categorically prohibited the sale of artifacts as follows:

> This court has continued RMS TITANIC, Inc. as salvor in possession of the wreck of the TITANIC from year to year on the understanding that RMS TITANIC, Inc. would treat and preserve all artifacts recovered and would exhibit them to the public and would not sell or dispose of any of said artifacts. . . .
>
> It has come to the attention of the court that there has been a change of management in RMS TITANIC, Inc. and that there is a concern held by some persons and organizations that RMS TITANIC, Inc. is considering disposal of some of the artifacts recovered. . . .
>
> It is ORDERED that RMS TITANIC, Inc. and any of its employees, agents or subcontractors may not sell or otherwise dispose of any artifacts or any object recovered from the TITANIC wreck site and further that it must continue to treat and preserve any such artifacts or objects recovered from the wreck site.

No one suggests that this July 2000 order did not unequivocally restate that RMST was still the appointed salvor and confirm that it was not authorized to "sell or dispose of any of said artifacts." Moreover, when, in April 2001, RMST proposed an

amendment to the July 2000 order to permit the sale of coal, an amendment to which the court agreed, RMST agreed with the court's interpretation of its June 1994 order. During the hearing that led to entry of the April 30, 2001 order permitting the sale of coal, the court also stated that "[i]t had earlier in 1994 issued an order awarding R.M.S. Titanic salvor-in-possession status, and that was based in part upon the understanding, I believe, of the court that the company intended to conserve and exhibit artifacts recovered from the wreck site."

Moreover, RMST never took issue with the court's clarifications and interpretations of the June 1994 order made in the July 2000 and April 2001 orders. It did not appeal either order. Any question about what the June 1994 order meant, therefore, was answered by the court's unappealed July 2000 order, as restated in the court's April 2001 order. Now, some 18 months after entry of the July 2000 order, RMST is simply not free to reargue that order, nor the April 2001 order.

In sum, while the language of the June 1994 order declaring RMST salvor-in-possession may have been ambiguous with respect to ownership of the artifacts, the contemporaneous understanding between the court and RMST at least put in doubt any claim to absolute ownership. More importantly, the court could not legally have awarded title to the artifacts to enforce RMST's salvage lien until the amount of the lien was decided and the value of the artifacts determined or evidence taken that the sale would produce less than the amount of the lien. As everyone understood, these determinations had not been made. Finally, the court construed its June 1994 order by its July 2000 and April 2001 orders, interpretations with which RMST agreed

and which it did not appeal. Accordingly, we will not now permit RMST to take a few words from the June 1994 order out of their context — both the context of that order and the context of the legal proceedings — to claim that it was granted absolute title to the artifacts at that time.

C

The remaining arguments do not require much discussion because they depend on RMST's reading of the June 1994 order as giving it absolute title to the artifacts as they were removed from the *Titanic*.

RMST's position that once it was awarded the artifacts "*in specie*," the district court was not free to restrict the disposition of the property and any such restriction amounted to a "taking of private property" may be a tenable position. But as pointed out above, the district court did not award RMST absolute title in the property, nor could it have in the circumstances. As a condition to such an award in a salvage proceeding, it would have had to complete execution or foreclosure of RMST's salvor's lien. Indeed, the reward secured by the salvor's lien had not yet been determined. Accordingly, this argument, while probably correct as an abstract statement, is irrelevant to what occurred in these proceedings.

Similarly, RMST may have a valid point when it asserts that RMST's expression of business plans cannot be converted to restrictions on property awarded to it as its reward. But again, this position is irrelevant because it assumes incorrectly that RMST had full title to the artifacts.

On another argument, RMST asserts correctly that its expression of business plans cannot form the basis for application of the doctrine of judicial estoppel. *See generally King v. Herbert J. Thomas Mem'l Hosp.*, 159 F.3d 192, 196-97 (4th Cir. 1998); *Lowery v. Stovall*, 92 F.3d 219, 223-24 (4th Cir. 1996). In making this argument, however, RMST assumed that it owned the artifacts and that judicial estoppel should not improperly be applied to deny it ownership. Again, this position is only hypothetical in the context of this case.

Finally, RMST argues that restrictions now in place that prohibit the sale and distribution of the artifacts are substantively "inappropriate." But this argument is also made in the context of RMST's position that it owned the artifacts. When it is acknowledged that the district court had not yet determined RMST's reward and had not yet executed RMST's salvor's lien, it must also be recognized that the property at this stage was *in custodia legis*, pending further proceedings, even though RMST had physical possession of the property. If the court in its discretion had determined that it would await completion of RMST's salvage services before determining an award, the court would not have acted inappropriately. Maintaining the artifacts in a single collection accommodates the possibility that their value in any subsequent sale might be greater in a collection than in pieces. On the other hand, the court would not need to await completion of RMST's salvage services as it could determine awards on a periodic basis. *See, e.g., Cobb Coin Co. v. Unidentified, Wrecked & Abandoned Sailing Vessel*, 549 F. Supp. 540, 561 (S.D. Fla. 1982) (retaining jurisdiction in ongoing salvage effort "[t]o adjudicate

the plaintiff's claim to a salvage award on a periodic basis" and requiring the salvor to file periodic reports that "catalogu[e] the artifacts saved in the previous calendar year" in order to determine each individual award). At the most recent hearing conducted by the district court in this case, the court expressed a willingness to consider a proposal to sell the artifacts, objecting only to deciding this question in the abstract. It invited RMST to submit an appropriate proposal. But, as of now, pending further decisions by the district court, RMST has not demonstrated that maintaining the artifacts as a collection is inappropriate or illegal. Indeed, in the end, RMST's lien might become more readily satisfiable by maintaining the artifacts as a collection at this time.

The *Titanic* was a historic ship, and the artifacts recovered from its wreckage therefore have enhanced value. RMST currently has a unique role as the *Titanic*'s exclusive salvor, and, having performed salvage services, it has a lien in the artifacts and is entitled to a reward enforceable against those artifacts. At this stage of the proceedings, however, we cannot conclude that RMST has title to any artifacts. We also cannot conclude that the course that the district court is pursuing violates the law of salvage or amounts to an abuse of discretion. Accordingly, the orders of the district court, dated September 26, 2001, and October 19, 2001, are affirmed.

AFFIRMED

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION
CIVIL ACTION NO. 2:93cv902
[Filed: October 19, 2001]
[Entered: October 19, 2001]

R.M.S. TITANIC, INC.,
Successor in interest to
Titanic Ventures, limited partnership,
Plaintiff,

v.

The Wrecked and Abandoned Vessel,
... believed to be the R.M.S. TITANIC,
in rem,
Defendant.

ORDER OF AMENDMENT

This Court's Order of September 26, 2001 is amended to include the following:

The R.M.S. *Titanic* has a history of its own that is different form any other. On its maiden voyage it sank after striking an iceberg. Many passengers and crew members died. The ship was a grave site, undisturbed for half a century. This queen of the sea flew the flag of Great Britain, a staunch ally of this country.

Congress has recognized the special nature of the wreck and the respect due the vessel. The R.M.S. Titanic Maritime Memorial Act of 1986, 16 U.S.C. § 450rr *et seq.*, seeks to encourage efforts to designate the R.M.S. *Titanic* as an international maritime memorial. Congress directed the United States to enter into negotiations with Canada, France, the United

Kingdom, and other interested nations to develop an international agreement that would designate the R.M.S. *Titanic* as an international maritime memorial and protect its scientific, cultural, and historical significance. 16 U.S.C. § 450rr-4.

By Order entered June 7, 1994, the Court awarded R.M.S. Titanic, Inc. ("RMST") salvor in possession status over the wreck and artifacts from the wreck. The salvors in possession of this vessel assured this Court throughout the pendency of this case on the Court's docket that they would not sell the artificats piecemeal and would keep them together to be seen and admired by many people. Before salvor in possession status was ever granted to RMST, the company assured the Court that RMST's intention was to exhibit, was to exhibit, not sell, the artifacts that had been salvaged from the ship. *See* Tr. Of Dec. 23, 1993 Hr'g at 10-11. The record is rife with similar representations RMST made to this Court. In its November 12, 1997 Periodic Report, RMST stated that

> [t]he long-term intent of [its] research and recovery is to keep the artifacts recovered from the *Titanic* together as a "collection" and make them available for exhibition to the public. Pursuant to its charter agreement with IFREMER[1] the Company has agreed that the "collection" of artifacts would not be sold by the Company to any individual or private collector. However, if it became

---

[1]INFREMER is the French government's oceanographic institute that had provided the salvage vessels, equipment, and technicians on past expeditions.

> necessary to protect the interests of the Company, all of the artifacts as a "collection" could be sold to an entity that would make them available for exhibition to the public, subject to the restrictions of the company's agreement with IFREMER. [The agreement with IFREMER] defines "artifact" as any object that was either a part of the *Titanic* or a possession of a person on board. Coins, coal, currency, diamonds (non-jewelry), previous metals, and gemstones are not considered artifacts for purposes of the IFREMER agreements.

Nov. 12, 1997 Periodic Report at 7. More recent Periodic Reports similarly affirm that "[t]he long-term intent of RMST's research and recovery program is to keep the artifacts recovered from the TITANIC together as a 'collection' and make them available for exhibition to the public." Mar. 13, 2000 Periodic Report at 13;[1] Apr. 5, 2001 Periodic Report at 7.

In March, 2000, RMST affirmed the assurances it had previously made to this Court, as seen by answers to question posed by counsel for RMST to Arnie Geller, the company's president. "Q: What are the company's present plans with regard to maintaining the collection of artifacts? A. Our intentions haven't changed since

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[1]In this Periodic Report, RMST made clear that it would meet its obligation to its shareholders. At that time, RMST anticipated the revenue from exhibitions of artifacts, combined with other sales and marketing efforts, would produce a profit such that RMST could continue to fulfill its obligations as salvor in possession as well as obligations to its shareholders. *See* Mar. 13, 2000 Periodic Report at 13-14.

we first stated those early on in this courtroom many years ago. We expect to recover objects from the wreck. We expect to maintain the collection and keep it together and not sell it off individually.... There are no plans to sell any portion of the collection." Tr. of Mar. 22, 2000 Hr'g at 34. In the same hearing, Mr. Geller discussed the restrictions in RMST's 1987 and 1993 charter agreements with IFREMER, in which RMST had agreed that all artifacts recovered would be kept together as a collection and made available to the public; if ever sold, the artifacts would be sold as a collection to an entity that agreed to make the objects available for public exhibition. *See* Tr. Of Hearing, March 22, 2000 at 38. Mr. Geller claimed that the current management of RMST had no plans to take actions inconsistent with the company's charter agreement with IFREMER. *See id.* at 39.

In addition, counsel for RMST provided the Court with a copy of a letter from George Tulloch, former president of RMST and general partner of RMST's predecessor in interest, Titanic Ventures Limited Partnership. In that letter date September 22, 1993 and addressed to Mr. Tricot, Heard of Headquarters of Maritimes Affairs in Lorient, France, Mr. Tulloch wrote,

> Titanic Ventures Limited Partnership (Titanic Ventures), as salvor, wishes to own the artifacts to which the owners or heirs have not been identified pursuant to the publicity measures implemented by the french [*sic*] authorities.

> On this occasion, I hereby, on behalf of Titanic Ventures and as Director of Titanic Ventures, state that Titanic Ventures intends to make a respectfull [*sic*] use of the artificats recovered from the Titanic in 1987 in memory of their initial owners.
>
> In this view, I indicate you [*sic*] that the artifacts will only be used on a cultural purpose and will not, therefore, be part of any operations which would lead to their dispersion, but to the exception of exhibition purposes, and none of the artifacts will be sold.

Letter from Tulloch to Tricot of Sept. 22, 1993, submitted by Mark S. Davis on behalf of RMST on January 5, 1994.

The Court has relied on these representations by RMST in many of its Orders. Most importantly, the Court relied on RMST's assurance when it granted RMST salvor in possession status in July, 1994. *See supra*, Tr. of Dec. 23, 1993 Hr'g at 10-11; *see also* May 10, 1996 Order at 8, n. 10, and 21; July 28, 2000 Order at 1-2. The Court has often recited RMST's professed intent that it had no current or future plans to sell any artifacts. *See, e.g., R.M.S. Titanic, Inc. v. The Wrecked and Abandoned Vessel*, 9 F. Sup. 2d. 624, 628 (E.D. Va. 1998); *R.M.S. Titanic, Inc. v. The Wrecked and Abandoned Vessel*, 924 F. Supp. 714, 717-718 (E.D. Va. 1996).

In fact, when RMST approached this Court in April, 2001 and first announced that it was interested in discussing the possibility of conveying the collection of artifacts to the newly created Titanic Foundation, of which Arnie Geller is president, counsel for RMST explicitly communicated to the Court the understanding that RMST's being granted salvor in possession status was based in part on the understanding that the company intended to conserve and exhibit artifacts recovered from the wreck site. *See* Tr of Apr. 9, 2001 Hr'g at 9.

This Court is well aware that circumstances change and it becomes necessary to change plans and approaches.

This Court, in its Order of September 26, 2001, did provide that the Court will consider any motions of R.M.S. Titanic, Inc. on the disposition of the artifacts, none of which has been presented to date with any specifity.

The Court DIRECTS the Clerk to mail a copy of this Order to all counsel of record and to the Clerk for the United States Court of Appeals for the Fourth Circuit.

IT IS SO ORDERED.

/s/ J. Calvitt Clarke, Jr.
UNITED STATES DISTRICT JUDGE

Norfolk, Virginia
October 19, 2001

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION
CIVIL ACTION NO. 2:93cv902
[Filed: September 26, 2001]
[Entered: September 26, 2001]

R.M.S. TITANIC, INC.,
Successor in interest to
Titanic Ventures, limited partnership,
Plaintiff,

v.

The Wrecked and Abandoned Vessel,
believed to be the R.M.S. TITANIC, *in rem*,
Defendant.

ORDER

Pursuant to an Order of the Court, a hearing was held on September 24, 2001. R.M.S. Titanic, Inc., the Salvor in Possession of the wreck of R.M.S. Titanic, was present by its Counsel and by Mr. Arnie Geller, its president.

During the hearing, the Court heard testimony of three witnesses and argument by Counsel, all on behalf of R.M.S. Titanic, Inc. The Court **FINDS** after the September 24, 2001 hearing that its previous Orders entered in this case, designed to prevent sales of individual artifacts recovered from the Wreck of R.M.S. Titanic, were proper and were necessary when entered.

The Court will, however, consider any motions or recommendations R.M.S. Titanic, Inc. might make that are designed to keep the recovered and to-be-recovered artifacts together as a group.

The Court DIRECTS the Clerk to mail a copy of this Order to all counsel of record.

IT IS SO ORDERED.

/s/ J. Calvitt Clarke, Jr.
UNITED STATES DISTRICT JUDGE

Norfolk, Virginia
September 26, 2001

PUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 98-1934
[Entered: March 24, 1999]

R.M.S. TITANIC, INCORPORATED,
successor in interest to Titanic
Ventures, limited partnership,
Plaintiff-Appellee,

v.

CHRISTOPHER S. HAVER; DEEP OCEAN
EXPEDITIONS,
Parties in Interest-Appellants,

and

THE WRECKED AND ABANDONED VESSEL,
its engines, tackle, apparel, appurtenances,
cargo, etc., located within one (1) nautical
mile of a point located at 41° 43' 32" North Latitude
and 49° 56' 49" West Longitude,
believed to be the *RMS TITANIC*, in rem,
Defendant,

LIVERPOOL AND LONDON STEAMSHIP
PROTECTION AND INDEMNITY ASSOCIATION
LIMITED,
Claimant,

WILDWINGS WORLDWIDE TRAVEL;
BAKERS WORLD TRAVEL;
QUARK EXPEDITIONS, INCORPORATED;
MIKE MCDOWELL; RALPH WHITE;
DON WALSH, Ph.D.; ALFRED S. MCLAREN, Ph.D.;
R/V AKADEMIK MSTISLAV KELDYSH;
BLACKHAWK TELEVISION,

Parties in Interest,

and
JOHN A. JOSLYN,

Movant.

THE EXPLORERS CLUB; THE ADVISORY
COUNCIL ON UNDERWATER ARCHAEOLOGY;
COLUMBUS-AMERICA DISCOVERY GROUP,

Amici Curiae.

Appeal from the United States District Court
for the Eastern District of Virginia, at Norfolk.
J. Calvitt Clarke, Jr., Senior District Judge.
(CA-93-902-N)
Argued: October 29, 1998
Decided: March 24, 1999

Before ERVIN, WILKINS, and NIEMEYER, Circuit Judges.

Affirmed in part, reversed in part, and remanded by published opinion. Judge Niemeyer wrote the opinion, in which Judge Ervin and Judge Wilkins joined.

COUNSEL

ARGUED: Alex Blanton, DYER, ELLIS & JOSEPH, Washington, D.C., for Appellants. F. Bradford Stillman, MCGUIRE, WOODS, BATTLE & BOOTHE, L.L.P., Norfolk, Virginia, for Appellee. **ON BRIEF:** Michael Joseph, Joseph O. Click, DYER, ELLIS & JOSEPH, Washington, D.C., for Appellants. Mark S. Davis, Douglas E. Miller, Lee A. Handford, MCGUIRE, WOODS, BATTLE & BOOTHE, L.L.P., Norfolk, Virginia, for Appellee. David G. Concannon, KOHN, SWIFT & GRAF, P.C., Philadelphia, Pennsylvania, for Amicus Curiae Explorers Club. John P. McMahon, MCMAHON & CONNELL, P.C., Charlotte, North Carolina, for Amicus Curiae Advisory Council. Richard T. Robol, COLUMBUS-AMERICA DISCOVERY GROUP, Columbus, Ohio, for Amicus Curiae Columbus-America.

OPINION

NIEMEYER, Circuit Judge:

This appeal presents questions about the authority of a United States court to regulate the salvage rights in the wreck of the luxury liner, *R.M.S. Titanic*, which lies in international waters.

The *Titanic* was launched in 1912 as the "largest and finest steamship ever built" and with the claim that she was "unsinkable." On her maiden voyage from Southampton to New York, however, with 2,340 passengers on board, the *Titanic* collided with an iceberg in the North Atlantic and sank less than three hours later, on April 15, 1912. A nearby ship saved 745

persons and some lifeboats and took them to New York. Another ship recovered several hundred bodies and took them to Halifax, Nova Scotia.

In 1985, the wreck of the *Titanic* was discovered at the bottom of the North Atlantic in international waters, approximately 400 miles off the coast of Newfoundland in 12,500 feet of water. Salvage efforts began two years later. In 1994, the district court in the Eastern District of Virginia, exercising "constructive *in rem* jurisdiction" over the wreck and the wreck site of the *Titanic*, awarded exclusive salvage rights, as well as ownership of recovered artifacts, to R.M.S. Titanic, Inc., ("RMST"), a Florida corporation. Two years later, the court rejected a challenge to the exclusive salvage rights of RMST, *see R.M.S. Titanic, Inc. v. The Wrecked and Abandoned Vessel*, ("*Titanic I*"), 924 F. Supp. 714 (E.D. Va. 1996), and shortly thereafter, entered an injunction dated August 13, 1996, protecting the salvage rights of RMST against *any person* in the world "having notice of this Order," prohibiting any such person from "conducting search, survey, or salvage operations, or obtaining any image, photographing or recovering any objects, entering, or causing to enter" the area of the Atlantic Ocean surrounding the *Titanic* wreck site. On June 23, 1998, the court reaffirmed, "personalized and enforced" the 1996 injunction against new parties. *R.M.S. Titanic, Inc. v. The Wrecked and Abandoned Vessel*, ("*Titanic II*"), 9 F. Supp.2d 624, 626 (E.D. Va. 1998). In that order, the court enjoined the appellants, Christopher S. Haver, an Arizona resident, and Deep Ocean Expeditions, ("DOE"), a British Virgin Islands corporation, as well as others from:

> (i) interfering with the rights of [RMST], as salvor in possession of the wreck and wreck site of the *R.M.S. Titanic*, to exclusively exploit the wreck and wreck site, (ii) conducting search, survey, or salvage operations of the wreck or wreck site, (iii) obtaining any image, video, or photograph of the wreck or wreck site, and (iv) entering or causing anyone or anything to enter the wreck or wreck site with the intention of performing any of the foregoing enjoined acts.

Id. at 640. The district court declared that the wreck site subject to the injunction was a 168-square-mile rectangular zone in the North Atlantic bounded by the following points:

> 41° 46' 25" North Latitude, 050° 00' 44" West Longitude, then east to 41° 46' 25" North Latitude, 049° 42' West Longitude, then south to 41° 34' 25" North Latitude, 049° 42' West Longitude, then west to 41° 34' 25" North Latitude, 050° 00' 44" West Longitude, then returning north to the start.

Id. DOE had planned an expedition to view and to photograph the *Titanic* for the late summer of 1998, and Haver had planned to be a passenger.

DOE, never a party to the proceedings in the district court, and Haver, who filed a declaratory judgment action in the district court to challenge the court's jurisdiction over the wreck and over him,

appealed to this court to challenge the June 1998 injunction. They claim (1) that the district court lacked jurisdiction over the wreck and wreck site, (2) that the court lacked personal jurisdiction over them, and (3) that the scope of the injunction is too broad. As they summarize their position,

> No theory of "constructive *in rem* jurisdiction" permits a court to adjudicate the rights of persons over which it lacks personal jurisdiction with respect to a vessel [in international waters] that has never been within the court's territory. Nor does any such theory authorize an injunction prohibiting persons from viewing and photographing a wreck when the salvor is not actively conducting salvage operations.

For the reasons that follow, we affirm in part and reverse in part the injunctions and remand the case to the district court with instructions to modify them in accordance with this opinion.

I

A procedural history, while somewhat involved, is nonetheless necessary for an understanding of the jurisdictional discussions that follow.

In 1985, a joint American-French expedition discovered the wreck of the *Titanic*. Two years later, in the summer of 1987, Titanic Ventures, a Connecticut limited partnership, in conjunction with the Institute of France for the Research and Exploration of the Sea, the

French government's oceanographic institution, voluntarily undertook efforts to salvage the wreck. Titanic Ventures conducted 32 dives over 60 days, recovering approximately 1,800 artifacts. It thereafter sold both its interest in the salvage operation and the artifacts it recovered to RMST. RMST recovered another 800 artifacts during a second expedition to the *Titanic*'s wreck site in 1993.

In August 1993, RMST filed this action in the Eastern District of Virginia, requesting, among other things, that the district court exercise *in rem* jurisdiction over the *Titanic* to award it exclusive salvage rights. In support of its request, RMST presented the court with a wine decanter salvaged from the *Titanic* and stated that numerous other artifacts were physically within the Eastern District of Virginia. The court issued a warrant directing the United States Marshal to arrest the wreck and all artifacts already salvaged and yet to be salvaged from the wreck and, at the same time, ordered that RMST be substituted for the Marshal as custodian of the wreck, the wreck site, and the artifacts. Formal notice of the court's order appeared in three newspapers, *The Virginian-Pilot*, *The Wall Street Journal*, and *The Journal of Commerce*.

Only one party, Liverpool and London Steamship Protection and Indemnity Association ("Liverpool & London"), filed a claim asserting an interest in the wreck. After RMST and Liverpool & London entered into a settlement agreement, the district court dismissed Liverpool & London's claim on June 7, 1994. On the same day, the court entered a separate order granting RMST not only exclusive

salvage rights over the wreck and the wreck site of the *Titanic*, but also "true, sole and exclusive owner[ship] of any items salvaged from the wreck."

In 1996, a competing salvor, John A. Joslyn, filed a motion in the action under Federal Rule of Civil Procedure 60(b), challenging RMST's status as exclusive salvor of the *Titanic* and requesting that the court rescind its June 1994 order. Joslyn claimed not only that RMST had failed diligently to salvage the *Titanic*, but also that RMST lacked the financial capacity to undertake future salvage operations. Following a hearing, the district court denied Joslyn's motion, finding that RMST had successfully undertaken a number of salvage operations and that its favorable prospects for ongoing and future salvage demonstrated that RMST deserved to remain the exclusive salvor-in-possession. *See Titanic I*, 924 F. Supp. at 722-24.

When Joslyn, nonetheless, expressed an intention to visit the wreck site for the sole purpose of taking photographs, the district court issued a temporary restraining order to prevent him from doing so. The court reasoned that "the need for R.M.S. Titanic, Inc. to have jurisdiction over the wreck site" brought with it a power to determine "who could enter the site for any purpose and who could photograph the ship and the locale." The district court converted the temporary restraining order to a preliminary injunction, dated August 13, 1996, enjoining Joslyn as well as "[a]ny other person having notice of this Order, actual or otherwise," from:

conducting search, survey, or salvage operations, or obtaining any image, photographing or recovering any objects, entering, or causing to enter, anything on or below the surface of the Atlantic Ocean, otherwise interfering with operations conducted by plaintiff, or entering the wreck site for any purpose not approved by R.M.S. Titanic, Inc., within a ten (10) mile radius of the following coordinates:

Longitude: 41 degrees 43 minutes North
Latitude: 49 degrees 56 minutes West
until further order of Court.

In entering the injunction, the court reasoned that "allowing another `salvor' to take photographs of the wreck and wreck site is akin to allowing another salvor to physically invade the wreck and take artifacts themselves."

In the spring of 1998, Deep Ocean Expeditions ("DOE"), a British Virgin Islands corporation headquartered on the Isle of Man, Great Britain, began marketing an expedition dubbed "Operation Titanic," planned for August 1998, that would allow members of the public to visit the wreck of the *Titanic*. The expedition was to be conducted with the assistance of the P.P. Shirshov Institute of Oceanology of the Russian Academy of Sciences in Moscow, using its research ship, the *R/V Akademik Keldysh*, and one of its two deep-sea submersibles, *Mir 1* or *Mir 2*. The

Russian submersibles had conducted numerous earlier dives to the *Titanic*. DOE announced the cost of participating at $32,500 per person. One of the subscribers was Christopher S. Haver, an Arizona resident.

When RMST learned that DOE's "Operation Titanic" would result in persons' viewing and photographing the *Titanic* wreck, RMST filed another motion for a preliminary injunction in this action to prevent DOE, among others, from visiting and photographing the wreck site. At the same time, Haver filed a separate action against RMST seeking a declaratory judgment that he had a right to enter the wreck site to observe, video, and photograph the *Titanic*. RMST filed a counterclaim in Haver's action, requesting a preliminary injunction to prohibit him from visiting the site. The district court consolidated Haver's action with the ongoing *in rem* action and conducted a hearing in the consolidated action on May 27, 1998. While Haver thus appeared by filing his own action to challenge the district court's jurisdiction over the wreck and the wreck site of the *Titanic*, as well as the court's personal jurisdiction over him, DOE did not appear, having not been served with any process.

Following the hearing, the district court disposed of all the issues before it in an order dated June 23, 1998. On the challenge to its exercise of *in rem* jurisdiction over the *Titanic*, the district court observed that while "[i]t is undisputed that the wreck lies in international waters . . . and no state may exercise sovereignty over any part of the high seas, . . . these rules must be harmonized with the internationally recognized rules of salvage." *Titanic II*, 9 F. Supp.2d at

634. Observing that "internationally recognized principles governing salvage on the high seas encourage the exercise of *in rem* jurisdiction over a wreck site to facilitate the salvage operation itself," the court affirmed its exercise of "constructive *in rem* jurisdiction over the *R.M.S. Titanic* wreck site to facilitate RMST's salvage operations . . . under international law." *Id.* In reaching this conclusion, the court explained:

> It is in the interest of the whole world to have salvage claims decided in a single forum so that multiple, conflicting litigation is avoided. The whole world is placed on notice of the action in this Court by the publication of notice of the *in rem* arrest. Moreover, the recognized international rights at stake are minimally infringed upon. Restricting freedom of navigation over a few square miles of the vast North Atlantic Ocean is hardly a significant intrusion.

Id. at 634-35.

The district court also rejected Haver's claims that the court did not have personal jurisdiction over him and that a new complaint for a preliminary injunction needed to be filed and served on him. The court noted that Haver consented to the court's jurisdiction by filing a declaratory judgment action raising the same issues affirmatively asserted by RMST. *See id.* at 635.

The district court then addressed the merits of the question of whether RMST, as salvor-in-possession, had the right to exclude others from visiting the wreck site to photograph the wreck. In justifying the entry of the injunction, the court relied upon general safety concerns caused by the depth and darkness of the North Atlantic waters around the wreck site, the need to protect RMST's substantial investment to date in salvaging the *Titanic*, and the public's interest in preventing unorganized, piecemeal salvaging of the *Titanic*, a shipwreck of great historical significance. *See id.* at 635-36. The court also observed that those enjoined by its order from personally viewing the *Titanic* could enjoy future television broadcasts of RMST's salvage efforts. *See id.* at 638. Accordingly, the court enjoined not only DOE and Haver, but also "anyone else having notice" from obtaining any image, video or photograph of the wreck or the wreck site and from "entering or causing anyone or anything to enter the wreck or the wreck site with the intention of performing any of the foregoing enjoined acts." *Id.* at 640. The court defined the wreck site as encompassing a 168 square mile area of the North Atlantic surrounding the wreck of the *Titanic*. *See id.* The injunction, by its terms, was to remain in effect "[u]ntil further order of this Court." *Id.*

From the district court's June 23, 1998 order, Haver filed this appeal. While DOE was not made a party to the litigation below, it too appealed because the injunction entered by the district court was specifically directed against it.

II

We resolve first the threshold question of whether DOE, who was not a party to the proceeding in the district court, may appeal the June 23, 1998 order enjoining it from visiting and photographing the *Titanic*. RMST contends that because DOE was a "non-party" in the action below, its appeal should be dismissed because "[n]on-parties have no right to appeal."

In the district court, RMST requested a preliminary injunction against DOE, arguing that DOE was subject to the jurisdiction of the court. It maintained that DOE had personal notice of the motion because RMST had made telephone calls to DOE's principal at his home in Germany informing him of the motion and because RMST served a copy of the motion on DOE's counsel in Washington, D.C. Despite this notice, DOE elected not to appear at the hearing. Because of DOE's failure to appear in the district court, RMST argues that DOE now has no right to appeal.

Consistent with its position that the district court lacked personal jurisdiction over it, DOE maintains that it did not appear because it was never served with process and, in any event, would not be subject to service of process. It notes, however, that because the court nevertheless granted RMST's motion and issued the June 23, 1998 preliminary injunction specifically "against Christopher Haver, Deep Ocean Operators [DOE]," and other related companies and persons, including DOE's principal, it is entitled to challenge the ruling.

This sequence of events reveals an inconsistency in RMST's position. RMST maintained that the district court had the power to enjoin DOE, and yet, after it successfully persuaded the court to do just that, it takes the position that DOE may not challenge entry of the injunction because DOE elected not to appear before the district court. We believe that this position is untenable.

Due process dictates and principles of fairness counsel that DOE be given an opportunity to challenge the district court's assertion of jurisdiction over it, particularly when the court specifically entered an injunction against DOE. *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 110-12 (1969). In *Hazeltine*, the Supreme Court permitted Hazeltine, the non-party parent company of the named counter-defendant, to challenge a money judgment and an injunction entered against it by the district court even though it was not a party to the district court's proceedings. The Supreme Court had little difficulty concluding that although Hazeltine's subsidiary had entered a pretrial stipulation in the district court that Hazeltine and its subsidiary were to be considered as one entity for purposes of the litigation, "this fact cannot [now] foreclose Hazeltine, which has never had its day in court" from being heard on that issue. *Id.* at 111. Likewise, we conclude that DOE should not be foreclosed from being heard on its jurisdictional challenge and that therefore it properly invoked 28 U.S.C. § 1292(a) to appeal the district court's jurisdiction to enter a preliminary injunction against it.

III

Also as a threshold question, we must determine whether a live case or controversy within the meaning of Article III of the Constitution remains, given the parties' representation to us at oral argument that Operation Titanic, the expedition prompting the district court's June 1998 order, took place in the fall of 1998. Accordingly, we must determine whether any decision by us today will make a difference to the parties by affording meaningful relief. *See Church of Scientology of California v. United States*, 506 U.S. 9, 12 (1992) ("It has long been settled that a federal court has no authority `to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue before it'" (quoting *Mills v. Green*, 159 U.S. 651, 653 (1895))).

The conflict between DOE's intention to continue its business as advertised and the scope of the district court's injunction protecting RMST indicates that a live controversy between the parties remains. Both in its brief and at oral argument, DOE expressed its intention to continue to undertake expeditions to the *Titanic* in the near future, and we have no reason to doubt its capacity to do so. Because the district court's injunction continues to preclude DOE from making any trips "[u]ntil further order from this Court," *Titanic II*, 9 F. Supp.2d at 640, a live controversy exists.

IV

Beyond these threshold questions of justiciability, both DOE and Haver challenge the district court's personal jurisdiction over them.

The district court justified its jurisdiction to enter an injunction against DOE because it had, what it called, "constructive *in rem* jurisdiction over the wreck itself based on the presence within the judicial district of physical items salvaged from the wreck." *Titanic II*, 9 F. Supp.2d at 632. Believing that United States district courts have jurisdiction to adjudicate salvage claims for wrecks in international waters, the district court concluded that the proper administration of a salvage claim required it to take *in rem* jurisdiction over the *Titanic* wreck in international waters and, with that jurisdiction, to "protect the salvor in possession when it is impossible to bring the entire wreck into the judicial district at a single point in time." *Id.* at 633. "Since the salvor is still performing salvage operations," the court reasoned, "the *in rem* case is still pending, and an injunction may properly issue pursuant to the Federal Rules of Civil Procedure." *Id.* at 635. The court thus concluded that its "constructive *in rem* jurisdiction" authorized it to enjoin DOE and others against interfering with the salvor's ongoing operations and that this authority extended against the "whole world." *Id.* at 634. The court explained:

> If notice is provided in a newspaper of general circulation, the whole world, it is said, are parties in an admiralty cause; and, therefore, the whole world is bound by the decision.

Id. (omitting internal quotation marks and citations). The court added that accordingly, "[a]ny current claim of ignorance to the *in rem* salvage action is necessarily foreclosed." *Id.*

In addition to the grounds advanced by the district court, RMST argues on appeal that not only does the district court have "the ability to enter orders against the whole world . . . based on its *quasi in rem* jurisdiction[1] over the wreck and wreck site," it also has the authority to exercise jurisdiction over "anyone who aids and abets Haver . . . in violating its orders." RMST contends that by agreeing to take Haver to the site, DOE was aiding Haver in violating the district court's injunction. Therefore, in RMST's view, because the district court had jurisdiction over Haver, it also had jurisdiction over DOE.

DOE maintains that the district court cannot enter an injunction against it without having personal jurisdiction over it and that in this case the court never obtained personal jurisdiction over it because: (1) a complaint against it was never filed as required by Federal Rule of Civil Procedure 3; (2) it was never served with a complaint and a summons or other process; and (3) such service, if made, would be

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[1]RMST's invocation of "*quasi in rem*" jurisdiction appears to be misplaced. *Quasi in rem* jurisdiction is invoked as an interim step to obtain *in personam* jurisdiction. *See Shaffer v. Heitner*, 433 U.S. 186, 196 (1977). To be sure, in *Shaffer*, the Court stated that in a *quasi in rem* action, the "only role played by the property is to provide a basis for bringing the defendant into court." *Id.* at 209. Articulating the role of *quasi in rem* jurisdiction, the Federal Rules of Civil Procedure state that when a complaint names a defendant who cannot be found within the district, property of the defendant within the district may be seized either to compel the defendant's appearance or to give effect to the relief requested in the complaint. *See* Fed. R. Civ. P. Supp. R. E(4). This case has little to do with *quasi in rem* jurisdiction because the wreck of the *Titanic* lies outside the district court's territorial jurisdiction. The proper inquiry here is whether a court in admiralty can award salvage rights in a shipwreck outside of United States' territorial waters.

ineffective because there is no authority for "worldwide service of process in admiralty cases . . . even if there were a constitutionally sufficient relationship between [DOE] and the forum."

Haver also challenges the district court's personal jurisdiction over him, arguing that he was never made a party to the *in rem* action initiated by RMST and that his separate declaratory judgment action was improperly consolidated with the *in rem* action to make him a party.

A

To resolve this jurisdictional dispute, we must first emphasize the distinction between *in personam* jurisdiction and *in rem* jurisdiction. While actions based on both types of jurisdiction are grounded on the principle that "every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory," *Pennoyer v. Neff*, 95 U.S. 714, 722 (1877), "[a]ctions *in rem* are prosecuted to enforce a right to *things*," whereas "actions *in personam* are those in which an *individual* is charged personally." *The Sabine*, 101 U.S. 384, 388 (1879) (emphasis added). Because *in rem* actions adjudicate rights in specific property before the court, judgments in them operate against anyone in the world claiming against *that* property. *See The Moses Taylor*, 71 U.S. (4 Wall.) 411, 427 (1866) (describing *in rem* jurisdiction and stating that "[i]t is this dominion of the suit in admiralty over the vessel or thing itself which gives to the title made under its decrees validity against all the world"); *see also Darlak v. Columbus-America Discovery Group,*

Inc., 59 F.3d 20 (4th Cir. 1995). Consequently, judgments in *in rem* actions affect only the property before the court and possess and carry no *in personam* significance, other than to foreclose any person from later seeking rights in the property subject to the *in rem* action. *See Pennoyer*, 95 U.S. at 724. The court's authority to exercise *in rem* jurisdiction does not carry with it a concomitant, derivative power to enter ancillary *in personam* orders. *See The Sabine*, 101 U.S. at 388.

In personam actions, on the other hand, adjudicate the rights and obligations of individual persons or entities. It is well established that due process precludes courts from adjudicating *in personam* the rights or obligations of persons in the absence of personal jurisdiction. *See Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co. Ltd.* , 484 U.S. 97, 104 (1987); *Zenith Corp.*, 395 U.S. at 110; *Koehler v. Dodwell*, 152 F.3d 304, 306-07 (4th Cir. 1998). To obtain personal jurisdiction over a defendant, a court must have (1) proof of "notice to the defendant," (2) "a constitutionally sufficient relationship between the defendant and the forum," and (3) "authorization for service of a summons on the defendant." *Omni Capital*, 484 U.S. at 104; *ESAB Group, Inc. v. Centricut, Inc.*, 126 F.3d 617, 622 (4th Cir. 1997).

Injunctive relief, by its very nature, can only be granted in an *in personam* action commenced by one party against another in accordance with established process. Consequently, a party cannot obtain injunctive relief against another without first obtaining *in personam* jurisdiction over that person or someone in legal privity with that person. *See* Fed. R. Civ. P. 65(d).

By contrast, injunctive relief ordered in an *in rem* action would be meaningless because things or

property cannot be enjoined to do anything. Likewise, personal jurisdiction need not be exercised in a pure *in rem* proceeding because, in the simplest of terms, a piece of property and not a person serves as the defendant. *See The Moses Taylor*, 71 U.S. at 431 ("The distinguishing and characteristic feature of . . . [an *in rem*] suit is that the vessel or thing proceeded against is itself seized and impleaded as the defendant, and is judged and sentenced accordingly"). *In rem* actions only require that a party seeking an interest in a *res* bring the *res* into the custody of the court and provide reasonable, public notice of its intention to enable others to appear in the action to claim an interest in the *res*. *See Roller v. Holly*, 176 U.S. 398, 403-06 (1900); *see also* Fed. R. Civ. P. Supp. R. C(4) (requiring public notice as part of an *in rem* admiralty proceeding).

Thus, when DOE and Haver argue that the district court lacked personal jurisdiction over them, they do not, of necessity, challenge RMST's status as exclusive salvor, and their personal jurisdiction challenge has no implication for the validity of the *in rem* proceedings or the order entered in 1994 awarding RMST its status as exclusive salvor of the wreck *Titanic*. DOE's challenge aims solely at the district court's authority to enter an *in personam* order against it absent personal jurisdiction over it.

B

Turning now to consider these requirements in the present context, it becomes readily apparent that the district court did not obtain *in personam* jurisdiction over DOE. While the district court had subject matter jurisdiction over this admiralty action, *see* 28 U.S.C. § 1333, this did not give it authority to issue process for extraterritorial service on DOE. Moreover, it is undisputed that RMST did not actually file a complaint against DOE, nor did it purport to serve DOE with any process. RMST's process consisted merely of filing a motion for preliminary injunction against DOE in the pending *in rem* action, to which DOE had never been made a party, and giving DOE informal notice of the motion's pendency.

DOE is a British Virgin Islands corporation with its principal place of business on the Isle of Man in Great Britain. Its principal resides in Germany where he concededly received notice by telephone of RMST's motion for preliminary injunction. DOE's counsel in Washington, D.C. also received a copy of the motion. In addition, constructive notice of the underlying *in rem* proceeding had been provided in 1993 through publication in *The Virginian-Pilot*, *The Wall Street Journal*, and *The Journal of Commerce*. Thus, there can be no dispute that DOE had actual notice of RMST's motion for an injunction. But this does not alone meet the formal requirements for obtaining personal jurisdiction over DOE.

Because DOE did not appear in the district court either in 1994 to claim an interest in the wreck of the *Titanic* or in 1998 to challenge RMST's motion for a preliminary injunction, it did not voluntarily subject

itself to the court's jurisdiction. Further, there is no evidence in the record at this point to suggest that DOE conducts any business in the United States. Its operations are conducted in Great Britain, and the expeditions it would be conducting to the *Titanic* would take place in international waters. It does, however, market its expedition in the United States through United States corporations. Indeed, it appears that through those marketing efforts, Haver learned of the expedition and subscribed to participate in it.

Whether DOE's contacts with the United States would justify service of process pursuant to Federal Rule of Civil Procedure 4(k) to obtain personal jurisdiction cannot be determined on this record. But it is clear that process against DOE never issued, nor was service of process ever attempted. As we have noted, while a district court having jurisdiction over a *res* is entitled to adjudicate salvage rights with respect to the *res*, when enforcing orders to give effect to those rights against a third party who, through conduct, challenges them, the court must obtain *in personam* jurisdiction over the third party through the service of process. Because such process was neither issued nor served on DOE in this case, the injunction against DOE must be vacated for lack of personal jurisdiction.

We also note that DOE's agreement to take Haver on an expedition to the *Titanic* does not place DOE in privity with Haver to entitle RMST to rely on jurisdiction over Haver to reach DOE. *See* Fed. R. Civ. P. 65(d). There is no evidence from which to infer that DOE conspired with or encouraged Haver to violate the district court's injunction, nor is there evidence that Haver actually violated its injunction.

C

As for Haver, we find his challenges to the district court's personal jurisdiction over him without merit. It is true that process did not issue from the *in rem* action to make Haver a party to that action. But that would not be otherwise, because the *in rem* action only addressed rights to the *res* of the *Titanic* wreck. And in challenging the district court's personal jurisdiction over him, Haver has asserted no right to the *res*.

Significantly, however, Haver commenced his own *in personam* action against RMST, seeking a declaratory judgment that, notwithstanding the August 1996 injunction entered in the *in rem* action, he was entitled "to enter the site of, and to observe, photograph, and videotape, the wrecked vessel *R.M.S. Titanic*." RMST filed a counterclaim against Haver in the declaratory judgment action seeking an injunction against him in that action just as it was seeking in the *in rem* action. Thus, Haver was a party to an action in which injunctive relief against him was sought.

The district court consolidated Haver's declaratory judgment action with the pending *in rem* action by order dated May 12, 1998. In its consolidation order, the district court stated that the *in personam* action "will no longer exist as a separate case." This consolidation was well within the district court's discretion. *See* Fed. R. Civ. P. 42(a) (authorizing consolidation of "actions involving a common question of law or fact"); *see also* Fed. R. Civ. P. 9(h) (authorizing unified actions but preserving, within actions, the nature of maritime claims).

By filing an *in personam* action in the district court seeking a declaratory judgment, Haver consented to the district court's personal jurisdiction over him, and RMST's counterclaim was part of that action. *See Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 (1982) (stating that an individual submits to a court's jurisdiction by appearance). When the district court granted RMST's motions for injunctive relief, which were filed both in the *in rem* acion and in Haver's action and later consolidated, Haver was a party. By consolidating the cases, the court surely did not relinquish its jurisdiction over Haver.

In short, Haver was properly before the district court as a party, and the district court had *in personam* jurisdiction to enter a preliminary injunction against him.

V

Because the district court had personal jurisdiction over Haver, we must address his claim that the district court could not have exercised jurisdiction over the wreck and the wreck site of the *Titanic* because the wreck lay in international waters. Haver maintains that while the presentation of a wine decanter and other artifacts from the wreck to the district court in the Eastern District of Virginia might have enabled the district court to exercise *in rem* jurisdiction over those artifacts, there exists no principle that authorized the district court to exercise *in rem* jurisdiction over the wreck itself which is beyond the territorial waters of the United States. Without *in rem* jurisdiction, Haver argues, the district court had no power to adjudicate

salvage rights and therefore had no power to enter an injunction giving effect to salvage rights.

Any analysis regarding the authority of a United States court to adjudicate salvage rights in shipwrecks in international waters requires inquiry first into several fundamental principles of admiralty: (1) the nature and scope of admiralty jurisdiction, (2) the applicability of salvage law as part of the common law of maritime nations, i.e., the *jus gentium*, and (3) the reach of an admiralty court's *in rem* jurisdiction. Only after we have explicated these principles can we address the existence and scope of authority of a United States court over the *Titanic*.

A

Article III of the Constitution extends the judicial power of federal courts to "all Cases of admiralty and maritime Jurisdiction." U.S. Const. art. III, § 2, cl. 1. And Congress implemented Article III by conferring on district courts exclusive, original jurisdiction of "[a]ny civil case of admiralty or maritime jurisdiction" and "[a]ny prize brought into the United States and all proceedings for the condemnation of property taken as prize." 28 U.S.C. § 1333. Maritime law was placed under national control "because of its intimate relation to navigation and to interstate and foreign commerce." *Panama R.R. Co. v. Johnson*, 264 U.S. 375, 386 (1924).

The body of admiralty law referred to in Article III did not depend on any express or implied legislative action. Its existence, rather, preceded the adoption of the Constitution. It was the well-known and well-developed "venerable law of the sea" which arose from the custom among "seafaring men," *see United States v. W. M. Webb, Inc.*, 397 U.S. 179, 191 (1970), and which enjoyed "international comity," *see The Belgenland*, 114 U.S. 355, 363 (1885). Nations have applied this body of maritime law for 3,000 years or more. Although it would add little to recount the full history here, we note that codifications of the maritime law have been preserved from ancient Rhodes (900 B.C.E.), Rome (Justinian's *Corpus Juris Civilis*) (533 C.E.), City of Trani (Italy) (1063), England (the Law of Oleron) (1189), the Hanse Towns or Hanseatic League (1597), and France (1681), all articulating similar principles. And they all constitute a part of the continuing maritime tradition of the law of nations -- the *jus gentium*.

The framers drafted Article III with this full body of maritime law clearly in view. This is not to say that the Constitution recognized an overarching maritime law that was to bind United States courts. On the contrary, the Constitution conferred admiralty subject matter jurisdiction on federal courts and, by implication, authorized the federal courts to draw upon and to continue the development of the substantive, common law of admiralty when exercising admiralty jurisdiction. *See The Lottawanna*, 88 U.S. 558, 572-78 (1874); *see also 1 Benedict on Admiralty* § 105, at 7-11 (7th ed. 1998). As Chief Justice Marshall observed:

> A case in admiralty does not, in fact, arise under the Constitution or laws of the

> United States. These cases are as old as navigation itself; and the law, admiralty and maritime, as it has existed for ages, is applied by our Courts to the cases as they arise.

The American Ins. Co. v. 356 Bales of Cotton, 26 U.S. (1 Pet.) 511, 544-45 (1828).

Since the Founding, federal courts sitting in admiralty jurisdiction have steadfastly continued to acquiesce in this *jus gentium* governing maritime affairs. Indeed, the Supreme Court has time and again admonished that "courts of this and other commercial nations have generally deferred to a non-national or international maritime law of impressive maturity and universality." *Lauritzen v. Larsen*, 345 U.S. 571, 581 (1953); *see also United States v. W.M. Webb, Inc.*, 397 U.S. at 191 (1970) (observing that the "[m]aritime law . . . provides an established network of rules and distinctions that are practically suited to the necessities of the sea"). This body of maritime law "has the force of law, not from extraterritorial reach of national laws, nor from abdication of its sovereign powers by any nation, but from acceptance by common consent of civilized communities of rules designed to foster amicable and workable commercial relations." *Larsen*, 345 U.S. at 581-82. Thus, when we say today that a case in admiralty is governed by the general maritime law, we speak through our own national sovereignty and thereby recognize and acquiesce in the time-honored principles of the common law of the seas. *See Ex Parte Western Maid*, 257 U.S. 419, 432 (1922).

The exercise of admiralty subject matter jurisdiction has never been limited to maritime causes arising solely in the United States territorial waters. On the contrary, maritime causes arising from matters on the high seas anywhere in the world have traditionally been brought to courts of admiralty, subject only to a discretionary exercise of the doctrine of *forum non conveniens*. *See Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 218-19 (1986); *see also Mason v. Ship Blaireau*, 6 U.S. (2 Cranch) 240 (1804); *The Belgenland*, 114 U.S. at 362-63 (*in rem* admiralty jurisdiction proper in action arising out of collision on the high seas between two foreign vessels); *Treasure Salvors, Inc. v. The Unidentified Wrecked & Abandoned Sailing Vessel*, 640 F.2d 560, 567 (5th Cir. 1981) ("Since the admiralty jurisdiction of United States courts is not limited by the nationality of ships, sailors or seas involved and since the principles of the law of salvage are part of the *jus gentium*, i.e., the international maritime law, United States courts have long adjudicated salvage claims involving foreign vessels, alien salvors and salvage operations occurring on the high seas"); Grant Gilmore & Charles Black, Jr., *The Law of Admiralty* § 1-19, at 51-52 (2d ed. 1975) (stating that "[t]he courts of the United States take jurisdiction, subject to some reservations imposed by their own application of the doctrine of *forum non conveniens*, of suits on maritime claims arising out of transactions and occurrences anywhere in the world" (footnotes omitted)).

Even though admiralty courts may adjudicate matters arising on navigable waters anywhere in the world, that recognition of subject matter jurisdiction does not imply that American courts in admiralty have the power to command that any person or any ship appear before a United States court sitting in admiralty. Stated differently, Article III of the Constitution and 28 U.S.C. § 1333 do not amount to an attempt by the United States to extend its sovereignty over persons (*in personam*) or things (*in rem*) beyond the territorial limits of the United States. While we note this important distinction between a broad subject matter jurisdiction and the limitation imposed by territorial jurisdiction, we discuss the territorial limitation in more detail, below.

B

The general maritime law of nations includes a law of finds and a law of salvage, and courts of admiralty apply one to the exclusion of the other, as appropriate, to resolve claims in property discovered and recovered in navigable waters by those other than the property's owners or those taking through them. *See Columbus America Discovery Group v. Atlantic Mut. Ins. Co.*, 974 F.2d 450, 459-60 (4th Cir. 1992). Under the law of finds, a person, who discovers a shipwreck in navigable waters that has been long lost and abandoned and who reduces the property to actual or constructive possession, becomes the property's owner. *See Martha's Vineyard Scuba Headquarters, Inc. v. The Unidentified, Wrecked and Abandoned Steam Vessel*, 833 F.2d 1059, 1065 (1st Cir. 1987); *Hener v. United States*, 525 F. Supp. 350, 354-57 (S.D.N.Y. 1981) (cited and

quoted with approval in *Columbus-America Discovery*, 974 F.2d at 460).

Because the law of finds deprives the true owner of a property right, the courts of admiralty disfavor its application and prefer to apply the law of salvage in its stead. They have reasoned that the law of salvage better serves the needs of maritime commerce by encouraging the saving of property for the benefit of its owner rather than the secretive discovery of property in an effort to deprive the owner of title. *See Columbus-America Discovery*, 974 F.2d at 464; *Hener*, 525 F. Supp. at 354 ("salvage law assumes that the property being salved is owned by another, and thus that it has not been abandoned"). Accordingly, the law of finds is most often applied in the context of long-lost shipwrecks. *See, e.g., Treasure Salvors, Inc. v. The Unidentified Wrecked & Abandoned Sailing Vessel*, 569 F.2d 330, 337 (5th Cir. 1978) (applying the law of finds to the recovery of a Spanish vessel which sunk near the Florida Keys in 1622, stating that "disposition of a wrecked vessel whose very location has been lost for centuries as though its owner were still in existence stretches the fiction to absurd lengths"); *see also* 3A *Benedict on Admiralty* § 158, at 11-17 (7th ed. Supp. 1991) (recommending "limit[ing] the doctrine of `find' relative to marine disasters to long-lost wrecks . . . or where the owners of maritime properties have publicly abandoned them" (footnote omitted)). Neither the parties nor the district court has urged the application of the law of finds in this case, leaving for application the law of salvage.

The principles of salvage law are intended to encourage persons to render prompt, voluntary, and effective service to ships at peril or in distress by

assuring them compensation and reward for their salvage efforts. *See The Akaba*, 54 F. 197, 200 (4th Cir. 1893). Absent the promise of compensation and reward, we question whether a party, even one with the capacity to save the *Titanic* itself, would incur the costs to do so. *See M/V JA Orgeron*, 143 F.3d at 986 n.12 (observing that "if the costs of performing a salvage are too high or the benefits to be derived are too low, the parties might well agree to call it a day and let the sea claim its prize"); *see also* William M. Landes & Richard A. Posner, *Salvors, Finders, Good Samaritans, and Other Rescuers: An Economic Study of Law and Altruism*, 7 J. Leg. Stud. 83, 100 (1978) (arguing that the law of salvage exists to "encourage rescues in settings of high transaction costs by simulating the conditions and outcomes of a competitive market").

The policies of salvage law have existed as an important part of the general maritime law of nations as long as there has been navigation. *See M/V JA Orgeron*, 143 F.3d at 985 ("This simple rule has been an integral part of maritime commerce in the western world since the western world was civilized"). Indeed, the 3,000-year old Rhodian Code provided:

> Article XLV. "If a ship be surprised at sea with whirlwinds, or be shipwrecked, any person saving anything of the wreck, shall have one-fifth of what he saves."

Reprinted in 3A *Benedict on Admiralty* § 5, at 1-8. And as to salvage from shipwrecks, the Rhodian Code provided:

> Article XLVII. "If gold, or silver, or any other thing be drawn up out of the sea eight cubits deep, he that draws it up shall have one-third, and if fifteen cubits, he shall have one-half, because of the depth."

Id. The Code also provided that those illegally pillaging a wreck would be required to restore fourfold. *See id.* The same principles of salvage were included in the Law of Oleron, codified about 2,000 years after the Rhodian Law and adopted in England in the 12th century. *See id.* § 8, at 1-11. And they continue to apply as part of the *jus gentium* today. *See, e.g., International Convention on Salvage, April 29, 1989,* preamble (providing that international salvage law should "ensure that adequate incentives are available to persons who undertake salvage operations in respect of vessels and other property in danger"); *see also United Nations Convention on the Law of the Sea,* Dec. 10, 1982, 21 I.L.M. 1245, 1326 art. 303 (providing that the Convention respects "the rights of identifiable owners, the law of salvage or other rules of admiralty").[2]

When providing salvage service, a salvor acts on behalf of the owner in saving the owner's property even though the owner may have made no such request or had no knowledge of the need. The law of salvage presumes that the owner desires the salvage service. And it is the assurance of compensation and reward that provides the "inducement to seamen and

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[2]Although the United States signed the United Nations Convention in 1994, the Senate has not yet provided the necessary advice and consent for ratification.

others to embark in such undertakings to save life and property." *The Blackwall*, 77 U.S. 1, 14 (1870) (citation omitted). As the Court in *Blackwall* explained, "Public policy encourages the hardy and adventurous mariner to engage in these laborious and sometimes dangerous enterprises, and with a view to withdraw from him every temptation to embezzlement and dishonesty, the law allows him, in case he is successful, a liberal compensation." *Id.* (footnote omitted). If the salvor fails in his salvage efforts, however, he can claim no compensation or reward.

To establish a salvage claim for compensation and award, a person must demonstrate (1) that he has rendered aid to a distressed ship or its cargo in navigable waters; (2) that the service was voluntarily rendered without any preexisting obligation arising from contract or otherwise to the distressed ship or property; and (3) that the service was useful by effecting salvage of the ship or its cargo, in whole or in part. *See The Sabine*, 101 U.S. 384, 384 (1879); *Brown v. Johansen*, 881 F.2d 107, 109 (4th Cir. 1989).

Upon rendering salvage service, a salvor obtains a lien in the saved property by operation of law to secure payment of compensation and award due from the property owner. *See The Sabine*, 101 U.S. at 386; *see also Amstar Corp. v. S/S Alexandros T.*, 664 F.2d 904, 909 (4th Cir. 1981). This lien attaches to the property to the exclusion of all others, including the property's true owner. And to facilitate enforcement of the lien, the salvor enjoys a possessory interest in the property until the salvor is compensated. *See S/S Alexandros T.*, 664 F.2d at 908-09. Because the salvor's lien is exclusive and

prior to all others, so too, the salvor's possessory interest in the *res* is enjoyed to the exclusion of all others, including the *res*' true owner.

By rendering salvage service, the salvor thus acquires a limited property interest in the goods saved -- a first lien and exclusive possession -- until the salvor has been paid or his right against the property has been enforced. *See The Emblem*, 8 F. Cas. 611, 614 (D. Me. 1840); 3A *Benedict on Admiralty* § 143, at 10-8 (quoting *The Emblem*). While this interest attaches only to saved property, to protect a salvor's general salvage rights, a court of admiralty will protect the inchoate right of salvors in yet-to-be salved property for a reasonable period. *See Treasure Salvors, Inc. v. The Unidentified Wrecked and Abandoned Sailing Vessel*, 546 F. Supp. 919, 929 (S.D. Fla. 1981).

Although a salvor may enforce its claim for salvage service by filing an *in personam* action against the owner, the salvor may also execute on the lien which attached to the ship and its cargo by filing an *in rem* action. The lien can be enforced only through the institution of an *in rem* action, and the admiralty court exercises *in rem* jurisdiction only to enforce a maritime lien. Thus, "[t]he lien and the proceeding *in rem* are . . . correlative - where one exists, the other can be taken, and not otherwise." *S/S Alexandros*, 664 F.2d at 909 (internal quotation marks omitted); *see also* Fed. R. Civ. P. Supp. R. C(1). To execute on the lien, the court may order the sale of the property, or, if a sale would yield an amount insufficient to fund an award to the salvor, the court may transfer title to the property to the salvor.

While the law of salvage provides substantial protection to salvors to encourage their saving of life and property at sea, it also imposes duties of good faith, honesty, and diligence in protecting the property in salvors' care. Thus, salvors have to exercise a trust over the property for the benefit of the owner and subject to any orders of a court. *See The Barque Island City*, 66 U.S. (1 Black) 121 (1861). In this vein, salvors are not entitled to remove property from the wreck for their own use or to use the property for their own use. When a violation of this trust occurs, the salvage claim is forfeited. *See Danner v. United States*, 99 F. Supp. 880 (S.D.N.Y. 1951). Indeed, it has been held that even when salvors have mistakenly misunderstood their rights and have taken property for their own use, they forfeited their right to a salvage award. *See, e.g., id.; see also The Mable*, 61 F.2d 537, 540 (9th Cir. 1932).

C

An *in rem* action, which is the most common process for enforcing a claim for salvage service, depends on the court's having jurisdiction over the *res*, the property which is named as defendant. *See Pennoyer*, 95 U.S. at 724. Only if the court has exclusive custody and control over the property does it have jurisdiction over the property so as to be able to adjudicate rights in it that are binding against the world. *See Darlak v. Columbus-America Discovery Group, Inc.*, 59 F.3d 20, 22-23 (4th Cir. 1995). Accordingly, to exercise *in rem* jurisdiction over a ship or its cargo, the ship or cargo must be within the district in which the *in rem* complaint is filed. *See The Brig Ann*, 13 U.S. (9 Cranch) 289, 291 (1815); *see also Platoro Ltd., Inc. v. The*

Unidentified Remains of a Vessel, 695 F.2d 893 (5th Cir. 1983); *see also* Fed. R. Civ. P. Supp. R. E(3) (providing that process *in rem* may only be served within the district).

While the *res* must be *in custodia legis* (in the court's possession), this possession may be actual or constructive. *See The Brig Ann*, 13 U.S. at 291. Constructive possession connotes something less than physical seizure of a *res* by a court. Just last term, for instance, the Supreme Court implicitly recognized the propriety of a district court's exercise of *in rem* admiralty jurisdiction over a shipwreck in California's territorial waters after a salvor presented "china, a full bottle of champagne, and a brass spike from the ship's hull" to the district court. *See California v. Deep Sea Research, Inc.*, 118 S. Ct. 1464, 1467 (1998). The propriety of exercising *in rem* jurisdiction over an entire ship wreck within the court's territorial jurisdiction when only part of that wreck is actually presented to a court rests upon the fiction that the *res* is not divided and that therefore possession of some of it is constructively possession of all. *See id.* at 1473.

But when the *res* is not in the court's actual or constructive possession, traditional principles of *in rem* jurisdiction dictate that the court may not adjudicate rights to the *res* and effectively bind others who may have possession. *See Pennoyer*, 95 U.S. at 724; *see also* Fed. R. Civ. P. Supp. R. E(3). Consequently, a court could not exercise *in rem* jurisdiction, as traditionally understood, so as to vest rights in property outside of its territory, such as in a shipwreck lying in

international waters. This conclusion is compelled by a recognition of the sovereign limits of the United States and the open nature of the high seas.

The sovereign limits of a nation are defined by those territorial boundaries within which it exercises supreme and exclusive power. Where a nation has boundaries contiguous to the high seas, international law defines the nation's sovereign limits by dividing navigable waters generally into three categories "distinguished by the nature of the control which the contiguous nation can exercise over them." *United States v. Louisiana*, 394 U.S. 11, 22 (1969) (footnote omitted).

Navigable waters that lie inland of a nation's borders are within the nation's complete control as with any real property within its borders. *See id.; see also The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 136 (1812) (Marshall, C.J.) (stating that the "jurisdiction of the nation within its own territory is necessarily exclusive and absolute"). Likewise within the general sovereign sphere of a nation are its territorial waters, defined as those navigable waters lying up to 12 nautical miles beyond a nation's shoreline. *See United States v. California*, 332 U.S. 19, 35 (1947) (stating that the extension of our territorial jurisdiction "is but a recognition of the necessity that a government next to the sea must be able to protect itself from dangers incident to its location"). And beyond the territorial waters lie the high seas, over which no nation can exercise sovereignty. *See Louisiana*, 394 U.S. at 23; *see also United States v. Louisiana*, 363 U.S. 1, 33-34 (1960) (stating that the "high seas, as distinguished from inland waters, are generally conceded by modern nations to be subject to the

exclusive sovereignty of no single nation"); *California*, 332 U.S. at 34 (stating that the United States, "throughout its existence has stood for freedom of the seas, a principle whose breach has precipitated wars among nations"); *The Vinces*, 20 F.2d 164, 172 (E.D.S.C. 1927) (stating that the high seas "are the common property of all nations"). The mutual access to the high seas is firmly etched into the *jus gentium*. *See, e.g., United Nations Convention on the Law of the Sea*, Dec. 10, 1982, 21 I.L.M. 1245, 1286-87 arts. 87, 89 (providing that the high seas shall be open to all nations and that "no State may validly purport to subject any part of the high seas to its sovereignty").[3]

Any extension of jurisdiction into the high seas by a nation must be "subject to the consent of other nations." *See Louisiana*, 363 U.S. at 34; *see also California*, 332 U.S. at 35 (stating that "whatever any nation does in the open sea, which detracts from its common usefulness to nations, or which another nation may charge detracts from it, is a question for

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[3]Under the 1982 United Nations Convention, an exclusive economic zone is recognized, beginning at the outer limit of the territorial waters and extending to 200 nautical miles from the nation's shoreline. Within this economic zone, a nation may exercise exclusive control over economic matters involving fishing, the seabed, and the subsoil, but not over navigation. *See United Nations Convention on the Law of the Sea*, Dec. 10, 1982, 21 I.L.M. 1245, 1280, arts. 56(1), 57. Even though the United States has not yet ratified this treaty, *see supra* note 2, it generally recognizes this 200-mile economic zone. *See* Thomas J. Schoenbaum, *1 Admiralty and Maritime Law*, § 2-16, at 35 (2d ed. 1994) (collecting legislation enacted by Congress in accordance with the Law of the Sea Convention).

consideration among nations as such, and not their separate governmental units" (footnote omitted)). We do, however, acknowledge that the law of nations sanctions limited extraterritorial exercises of jurisdiction. *See, e.g., Louisiana*, 363 at 34 n.60 ("For example, the United States has long claimed the right to exercise jurisdiction over domestic and foreign vessels beyond the three-mile limit for purposes of customs control and for defense purposes and this practice is recognized by international law" (citations omitted)); *Hudson & Smith v. Guestier*, 10 U.S. (6 Cranch) 281, 284 (1810) (recognizing that a seizure of property on the high seas, beyond the territorial limits of all nations, for breach of a municipal revenue raising regulation is warranted by the *jus gentium*).

In sum, because the exercise of *in rem* jurisdiction depends on the court's exercise of exclusive custody and control over the *res*, the limits of *in rem* jurisdiction, as traditionally understood, are defined by the effective limits of sovereignty itself.

VI

In applying these principles to a wreck lying in international waters, obvious complexities emerge. *In rem* jurisdiction, which depends on sovereignty over property, cannot be given effect to property beyond a nation's boundaries of sovereignty. *See Pennoyer*, 95 U.S. at 722 (stating "that every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory"). Where both persons and property are beyond a nation's zone of exclusive legal power, its ability to adjudicate rights as to them is limited, but not meaningless.

When nations agree on law to apply on the high seas, they agree to an order even beyond their sovereign boundaries which, while they hope will be honored on the high seas, can only be enforced completely and effectively when the people or property are brought within a nation's zone of power -- its sovereignty.

So it must be with the *Titanic*. The *jus gentium*, the law of all maritime nations, is easy to define and declare. But its enforcement must depend on persons or property involved in such a declaration coming into the zone of power of participating nations. We now turn to observe how these intersecting principles operate in this case.

A

First, Haver presents us with no reason to upset the district court's findings that RMST (and its predecessors) represented the first party successfully to salvage the wreck of the *Titanic* and that RMST has continued and plans to continue its substantial efforts. As the district court recognized, salvaging the wreck of the *Titanic* has presented a challenge of unprecedented proportion. Because the wreck lies under 2.5 miles of water, where there is virtually no light, the water is frigid, and the water pressure beyond general comprehension, only the most sophisticated oceanographic equipment can explore the site and recover property. Doing so is time consuming, expensive, and dangerous.

Since 1993, RMST has overcome these challenges, conducting research and recovery expeditions in June 1993, July 1994, and August 1996. From these expeditions, it has been able to recover over 3,600 artifacts from the wreck and to gather thousands of photographs and hundreds of hours of video footage. As the district court observed, "RMST has exhibited considerable zeal as salvor in possession despite the fact that salvaging the wreck is extremely time consuming, dangerous, and expensive." *Titanic II*, 9 F. Supp.2d at 627.

As the first successful salvor, RMST obtained an inchoate lien as a matter of law in the wreck as well as the artifacts from the wreck to enforce its claim for compensation and reward. And with its lien, RMST obtained the right to exclusive possession, not only of the artifacts removed from the wreck of the *Titanic*, but also of the wreck itself, so that no other person is entitled lawfully to intrude as long as salvage operations continue. *See Treasure Salvors, Inc.*, 640 F.2d at 567.

Because RMST has necessarily acted on behalf of the owners of the property even if the owners did not or could not know of RMST's efforts, its interest in the property is limited to an exclusive possessory right, not for its own use, but for the purpose of bringing the property within the jurisdiction of a court in admiralty to enforce its maritime lien securing its claim for compensation and reward. But once the property is brought in *custodia legis*, the court can execute on RMST's lien and sell the property, or if the sale of the property would prove insufficient to compensate RMST fairly, the court can award title in the property to RMST.

These conclusions reached by the district court about RMST's rights are consistent with the salvage law which is part of the *jus gentium*, and we expect that whether RMST had returned property from the *Titanic* to an admiralty court in England or France or Canada, the court would, by applying the same principles, have reached the same conclusions. The need for courts of admiralty to apply the law similarly is fundamentally important to international commerce and to the policies supporting order on the high seas. It is therefore prudent for us, as one such court sitting in admiralty, to assure enforcement in harmony with these shared maritime principles. And to this end, we are satisfied that to the extent the district court applied these principles, it acted in accordance with the *jus gentium* in awarding RMST exclusive salvage rights in the wreck of the *Titanic*.

B

Although the district court applied principles of the *jus gentium* to award RMST exclusive salvage rights in the *Titanic*, the question peculiar to this case remains how, if at all, can a court in admiralty enforce these salvage rights with respect to property that does not lie within its jurisdiction, nor, for that matter, within the jurisdiction of any admiralty court.

RMST argues, somewhat boldly and apparently without any direct legal authority, that an admiralty court can simply assert *in rem* jurisdiction over wrecks lying in international waters, beyond the territorial limits of the court's jurisdiction, and enter orders to

enforce that jurisdiction. But this fails to account for the limits of courts' jurisdiction and, indeed, the limits of national sovereignty.

In rem jurisdiction is traditionally justified by the presence of the *res* within the jurisdiction of the court. Having exclusive legal custody over the *res*, whether actual or constructive, enables the court to issue orders respecting the *res* that are exclusive as against the whole world. With *in rem* jurisdiction, therefore, a court has the power, among others, to order the seizure, the sale, or the transfer of the *res*. It follows that when the *res* is outside the jurisdiction of the court, indeed, beyond the territorial limits of the United States, the court cannot exercise *in rem* jurisdiction over it, at least in the traditional sense.

In this case, the district court recognized this limitation and rested its authority over the wreck of the *Titanic* on what it called "constructive *in rem*" jurisdiction. Obviously, any power exercised in international waters through "constructive *in rem*" jurisdiction could not be exclusive as to the whole world. For example, a French court could presumably have just as well issued a similar order at the same time with no less effect. But this non-exclusive control over the *res* would not defeat the district court's first purpose of declaring salvage rights to the wreck as against the world. In fact, we believe that the *jus gentium* authorizes an admiralty court to do so, even though the exclusiveness of any such order could legitimately be questioned by any other court in admiralty. The ultimate resolution could only occur at such time as property is removed from the wreck and brought within the jurisdiction of an admiralty court,

giving it exclusive *in rem* jurisdiction over the property or when the persons involved in any dispute over the property are before the court *in personam*.

But this limitation on the jurisdiction exercised by the district court does not mean that its declaration with respect to the *res* was ineffective. We believe that the district court has a "constructive" -- to use the district court's term -- *in rem* jurisdiction over the wreck of the *Titanic* by having a portion of it within its jurisdiction and that this constructive *in rem* jurisdiction continues as long as the salvage operation continues. We hasten to add that as we use the term "constructive," we mean an "imperfect" or "inchoate" *in rem* jurisdiction which falls short of giving the court sovereignty over the wreck. It represents rather a "shared sovereignty," shared with other nations enforcing the same *jus gentium*. Through this mechanism, internationally recognized rights may be legally declared but not finally enforced. Final enforcement requires the additional steps of bringing either property or persons involved before the district court or a court in admiralty of another nation.

Testing the effect of a United States court's attempt to assert exclusive jurisdictional power over property located beyond the territorial limits of the United States quickly brings a pragmatic response. When a nation seeks to exert sovereignty through exclusive judicial action in international waters, the effort prompts the obvious question of how the jurisdiction is to be enforced. But even beyond this pragmatic consideration lies the yet more significant consideration that asserting sovereignty through a claim of exclusive judicial action beyond the territorial

limits of a nation would disrupt the relationship among nations that serves as the enforcement mechanism of international law and custom. What would occur if an English or French court were to exercise similar power? The necessary response to probes such as these leads to the now well-established norm of international law that no nation has sovereignty over the high seas. *See, e.g., United Nations Convention on the Law of the Sea*, Dec. 10, 1982, 21 I.L.M. 1245, 1287 art. 89 (providing that "no state may validly purport to subject any part of the high seas to its sovereignty").

This conclusion that no nation has sovereignty through the assertion of exclusive judicial action over international waters does not leave the high seas without enforceable law. The law of salvage as shared by the nations as part of the *jus gentium* applies to the high seas, and we are satisfied that it will do no violence to the relationship among nations to enforce these rights to the extent generally recognized on a non-exclusive basis. For this reason, we conclude that the district court was correct in declaring that RMST has salvage rights in the wreck of the *Titanic* and that these rights include the right exclusively to possess the wreck for purposes of enforcing the maritime lien that RMST obtained as a matter of law. It also follows that the district court acted properly in entering an injunction against persons over whom it had jurisdiction, prohibiting them from interfering with the salvage efforts being pursued by RMST. We believe that these aspects of the district court's declaration and

injunction would be recognized by all maritime nations and similarly be enforced by their courts.[4]

But we hasten to point out, again, that the power of an American court to enforce such orders is effectively limited until persons and property are brought within its territorial jurisdiction. These are limits that any court faces, regardless of the nation involved. Shared rights to the high seas may be exercised by all nations, and the assertion by any nation of exclusive sovereignty over a portion would interfere with those rights. This notion of "shared sovereignty" does not, however, preclude all nations from enforcing the internationally recognized laws of

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[4]In reaching this conclusion, we reject Haver's argument that the R.M.S. Titanic Maritime Memorial Act of 1986, 16 U.S.C. § 450rr *et seq.*, precluded the district court from exercising jurisdiction over the wreck of the *Titanic*. That statute, while recognizing the "major national and international cultural and historical significance" of the *Titanic*, 16 U.S.C. § 450rr(a)(3), merely exists to encourage the United States (or more specifically, the President) to coordinate cooperative international efforts "for conducting research on, exploration of, and if appropriate, salvage of the R.M.S. Titanic." 16 U.S.C. § 450rr(b)(3). The statute also specifically expresses Congress' sense that "research and limited exploration activities concerning the R.M.S. Titanic should continue for the purpose of enhancing public knowledge of its scientific, cultural, and historical significance" pending the consummation of such international efforts. 16 U.S.C. § 450rr-5.

We also refuse to construe the language in § 450rr-6 of the statute - - "By enactment of sections 450rr to 450rr-6 of this title, the United States does not assert sovereignty, or sovereign or exclusive rights or jurisdiction over, or the ownership of, any marine areas or the R.M.S. Titanic" -- as stripping the federal courts of jurisdiction over the wreck for purposes of recognizing, consistent with the *jus gentium*, RMST as the wreck's exclusive salvor. Read in the context of the entire R.M.S. Titanic Memorial Act, we believe that language has no bearing in this appeal.

salvage in courts with respect to persons and property within their jurisdiction, nor even from exercising this form of shared sovereignty for matters on the high seas.

If we were to recognize an absolute limit to the district court's power that would preclude it, or essentially any other admiralty court, from exercising judicial power over wrecks in international waters, then we would be abdicating the order created by the *jus gentium* and would return the high seas to a state of lawlessness never experienced -- at least as far as recorded history reveals. We refuse to abdicate in this manner.

VII

While we affirm the district court's order enjoining Haver from interfering with the ongoing salvage operations of RMST, we must still address the additional terms to which he objects: (1) whether salvage rights include the right to exclude others from visiting, observing, and photographing the wreck; and (2) whether, in enjoining others from interfering with the ongoing salvage operations, the district court could exclude others from an area within a 10-mile radius (the 314-square mile circular area protected by its August 1996 order) or a 168-square mile rectangular area (protected by its June 1998 order), both of which lie entirely within international waters.

The June 1998 injunction provided in pertinent part:

> Until further order of this Court, these parties [including Haver] are ENJOINED from (i) interfering with the rights of RMST, as salvor in possession of the wreck and wreck site of the R.M.S. TITANIC, to exclusively exploit the wreck and wreck site, (ii) conducting search, survey, or salvage operations of the wreck or wreck site, (iii) obtaining any image, video, or photograph of the wreck or wreck site, and (iv) entering or causing anyone or anything to enter the wreck or wreck site with the intention of performing any of the foregoing enjoined acts.

Titanic II, 9 F. Supp.2d at 640. This injunction was a reiteration of the court's August 1996 injunction in which it, for the first time, explicitly prohibited others from photographing the wreck or wreck site of the *Titanic*. In entering the 1996 order, the court expanded traditional salvage rights to include the right to exclusive photographing of the wreck and the wreck site. The court explained:

> [I]f R.M.S. TITANIC is not selling artifacts like traditional salvors, it must be given the rights to other means of obtaining income. The court finds that in a case such as this, allowing another "salvor" to take photographs of the wreck and wreck site is akin to allowing another salvor to physically invade the wreck and take artifacts themselves.

The court pointed out that photographs could be marketed like any other physical artifact and therefore that the rights to record images of the *Titanic* belonged to RMST, the salvor in possession of the wreck.

The district court's expansion of salvage rights to include the right exclusively to photograph or otherwise record images of the wreck for the purpose of compensating salvors for their effort is both creative and novel. We are aware of no case in the United States or in the body of *jus gentium*, however, that has expanded salvage rights to include this type of a right. More importantly, we are not satisfied that the law of salvage would be properly extended to give salvors exclusive image recording rights in yet to be saved property. The underlying policy of salvage law is to encourage the voluntary assistance to ships and their cargo in distress. *See, e.g., The Sabine*, 101 U.S. 384; *Columbus-America*, 974 F.2d at 459; *The Akaba*, 54 F. at 200. And the salvage service is useful to owners only when it effects *a saving of the specific property* at risk. The law does not include the notion that the salvor can use the property being salvaged for a commercial use to compensate the salvor when the property saved might have inadequate value. Traditionally, the inducement for salvage service is limited to the court's award of compensation and reward, which may be enforced *in personam* against the owner without regard to the property saved, or *in rem* against the property saved.

To award, in the name of salvage service, the exclusive right to photograph a shipwreck, would, we believe, also tend to convert what was designed as a salvage operation on behalf of the owners into an operation serving the salvors. The incentives would run counter to the purpose of salvage. Salvors would

be less inclined to save property because they might be able to obtain more compensation by leaving the property in place and selling photographic images or charging the public admission to go view it.

Even if we were to assume that the salvors had full title to the yet to be recovered shipwreck, as would be the case if the law of finds were applied, it is doubtful that such title to property lying in international waters would include the right to exclude others from viewing and photographing it while in its public site. Exclusive viewing and photographing of property is usually achieved by exercising exclusive possession and removing the property to a private or controllable location where it cannot be viewed or photographed except under conditions controlled by the owner. But a property right does not normally include the right to exclude viewing and photographing of the property when it is located in a public place.[5]

In addition, if we were now to recognize, as part of the salvage law, the right to exclude others from viewing and photographing a shipwreck in international waters, we might so alter the law of salvage as to risk its uniformity and international comity, putting at risk the benefits that all nations enjoy in a well-understood and consistently-applied body of law. This risk is heightened when it is

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[5]For instance, even under American copyright law, where an architect has a copyright in the design of a building, that right does not extend to prevent the viewing and photographing of the building, if it is located at a public site or is visible from a public place. *See* 17 U.S.C. § 120(a).

understood that such an expansion of salvage rights might not encourage salvage and might, additionally, discourage free movement and navigation in international waters.

For these reasons, we conclude that the district court erred in extending the law of salvage to vest in RMST exclusive rights to visit, view, and photograph the wreck and wreck site of the *Titanic* at its location in international waters.

The district court's August 1996 injunction also prohibited anyone from entering within a 10-mile radius of the wreck site to search, survey, or obtain any image of the wreck or wreck site, and the court's June 1998 order prohibited anyone from entering, for a similar purpose, a rectangular area around the wreck site computed to be 168-square miles. Neither prohibition is justified by the law of salvage or allowed by the law of free navigation on the high seas. For the same reasons that we gave in denying exclusive viewing and photographing rights -- that to do so would alarmingly expand salvage law and interfere with the right of free navigation -- we also reverse these aspects of the district court's orders. This does not mean, however, that a court may not enforce salvage rights by prohibiting a party over whom it has personal jurisdiction from conducting salvage operations or interfering with the first salvor's exclusive possession of the wreck for purposes of salving it.

VIII

In summary, we conclude that this appeal presents us with a case or controversy as understood under Article III of the Constitution. We also consider DOE's appeal of the June 1998 injunction directed against it, even though DOE was not a party to the district court proceedings, and agree with DOE that the injunction against it is not enforceable because it was never made a party through proper service of process nor was it in privity with the party. We reject, however, Haver's personal jurisdictional challenge. With respect to Haver's challenge to the injunctions themselves, we affirm in part and reverse in part. We affirm the district court's injunctions insofar as they enjoin parties and persons in privity with them from conducting salvage operations of the *Titanic* wreck and interfering with the salvage operations of RMST. We reverse them insofar as they purport to prohibit the visiting, viewing, searching, surveying, photographing, and obtaining images of the wreck or the wreck site, as long as these activities do not constitute any salvage effort or interfere with RMST's salvage rights.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION
CIVIL ACTION NO. 2:93cv902
[Filed: June 7, 1994]
[Entered: June 7, 1994]

R.M.S. TITANIC, INC.,
successor in interest to
Titanic Ventures, limited partnership,
Plaintiff,

v.

The Wrecked and Abandoned Vessel,
its engines, tackle, apparel, appurtenances,
cargo, etc., Located within one (1) nautical
mile of a point located at 41° 43' 32" North Latitude
and 49° 56' 49" West Longitude,
believed to be the RMS TITANIC, in rem,
Defendant.

DISMISSAL ORDER

THIS DAY CAME the plaintiff, R.M.S. Titanic, Inc. and the claimant, Liverpool and London Steamship Protection and Indemnity Association, and representing to the Court that all matters and controversies between them have been compromised and settled, and upon the joint motion of the plaintiff and claimant, by counsel, it appearing just to do so, it is hereby ADJUDGED and ORDERED that the claim of

Liverpool and London Steamship Protection and Indemnity Association be dismissed as agreed with prejudice, each party to bear its own costs.

ENTERED this 7 day of June, 1994.

/s/ J. Calvitt Clarke, Jr.
United States District Judge

WE ASK FOR THIS:

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Defendant.

ORDER

On motion of the plaintiff, R.M.S. Titanic, Inc., successor in interest to Titanic Ventures, limited partnership, the Court recognizing that plaintiff filed a verified complaint on August 26, 1993, that this Court entered an Order for Issuance of Warrant of Arrest on August 27, 1993 taking constructive possession of the defendant wreck and directing that all claims be filed with the Court, that a Warrant for Arrest *In Rem* was issued on August 27, 1993, that Liverpool and London Steamship Protection and Indemnity Association Limited was the only party to file a claim in this action

prior to the deadline for the filing of such claims, and such claim has now been dismissed with prejudice upon the joint motion of the plaintiff and claimant;

The Court FINDS AND ORDERS that R.M.S. Titanic, Inc. is the salvor in possession of the wreck and wreck site of the R.M.S. Titanic, including without limitation, the hull, machinery, engine, tackle, apparel, appurtenances, contents and cargo, and that R.M.S. Titanic, Inc. is the true, sole and exclusive owner of any items salvaged from the wreck of the defendant vessel in the past and, so long as R.M.S. Titanic, Inc. remains salvor in possession, items salvaged in the future, and is entitled to all salvage rights, and that default judgment is entered against all potential claimants who have not yet filed claims and such claims are therefore barred and precluded so long as R.M.S. Titanic, Inc. remains salvor in possession, and the Court accordingly enters judgment in favor of R.M.S. Titanic, Inc.

ENTERED this 7 day of June, 1994.

/s/ J. Calvitt Clarke, Jr.
United States District Judge

WE ASK FOR THIS:

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Mark S. Davis (VSB No. 29006)
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By: /s/Mark S. Davis
Mark S. Davis